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Joint Ventures Under EEC Law

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Abstract

This Article attempts to construct an intellectually coherent and predictable analysis of joint ventures, an undertaking which faces more serious problems under EEC law than U.S. law. First, EEC law makes it necessary to determine whether the Merger Regulation or Article 85 applies to any given joint venture. Second, Article 85's unfortunate bifurcation into paragraphs (1) and (3) (notification or nullity) and the resultant division of what should be a single antitrust analysis poses significant obstacles in the EEC treatment of joint ventures.

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I. INTRODUCTION

A. *The General Problem: Joint Ventures Have Structural and Behavioral Aspects*

The antitrust analysis of joint ventures is one of the most

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difficult issues in antitrust law. The term itself is loosely used and covers a wide variety of business arrangements.¹ Legal definitions are equally elusive. In most countries' legislation, there is no statutory definition even where the term joint venture appears in the statute.² For example, the EEC block exemptions on patent and know-how licensing exclude certain "joint ventures" between competing parents from coverage without defining that term. U.S. courts have not precisely defined what constitutes a joint venture, although classification of an arrangement as a joint venture can result in the application of different legal standards.³ Commentators also differ. Some focus on the creation or facilitation of increased output. Others emphasize efficiency enhancement more generally. Still others, like the U.S. Department of Justice, focus on economic integration between the parties as the essential characteristic of a joint venture.⁴

But much of the analytical confusion about joint ventures has a deeper cause. Full-function arrangements between firms invariably have both behavioral and structural aspects and implications.⁵ Arrangements between actual competitors can be arranged along a spectrum:

Mergers—Joint Ventures—Cartels

1. These range from full-function joint ventures, in which two competitors place their entire overlap businesses into a new corporate entity, to simple joint research and development ("R & D") or joint purchasing. This Article focuses on more complete or full-function joint ventures. It does not discuss single-function arrangements like joint advertising, joint R & D, joint purchasing or joint selling. For further discussion of these arrangements, see 2 BARRY HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST* (2d ed. 1985 & Supp. 1992) [hereinafter *HAWK TREATISE*].

2. One important exception is the EEC Merger Regulation's definitions of concentrative and cooperative joint ventures. Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990) [hereinafter *Merger Regulation*]; see *infra* part II.B (discussing *Merger Regulation*). Certain defined "joint ventures" are exempted from the Canadian pre-merger notification provisions. See *Canadian Competition Tribunal Act*, R.S.C., ch. 19, § 112 (2d Supp. 1988) (Can.).

3. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

4. This last definition may be the most attractive under U.S. antitrust law as long as it is recognized that cooperative arrangements between actual or potential competitors that fail to involve integration should not be condemned simply because they are not classified as "joint ventures."

5. This can also be true of single-function arrangements, such as joint R & D agreements in industries where R & D is highly significant.

A particular joint venture (or a class of joint ventures) may be viewed more like a close-knit integrated combination (merger) or more like a loose-knit combination between independent firms (cartel).⁶

The vast majority of the world's antitrust laws have different statutes and substantive rules dealing with mergers on the one hand and cartels on the other hand.⁷ This difference in treatment rests on the theory that mergers have to do with structure and cartels have to do with behavior. Because joint ventures frequently have both structural and behavioral aspects, the merger laws and the cartel laws are both applied to joint ventures in many jurisdictions. For example, section 1 of the Sherman Act,⁸ the rough counterpart of Article 85 of the Treaty Establishing the European Economic Community (the "EEC Treaty"),⁹ and section 7 of the Clayton Act,¹⁰ the

6. This suggests the importance of economic integration as perhaps the essential characteristic of a joint venture, at least where the legal issue is whether an arrangement should be viewed under stricter anti-cartel rules. A joint venture shifts towards the mergers end of the spectrum to the extent that the parties integrate their operations. Conversely, the less the economic integration, the more the parties remain independent operators.

7. Single-function joint ventures, notably R & D joint ventures, are frequently subject to separately legislated rules. *See, e.g.*, National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301-4305 (1988); Commission Regulation No. 418/85, O.J. L 53/5 (1985) (block exemption for joint R & D). There are pending U.S. legislative proposals concerning production joint ventures.

8. 15 U.S.C. § 1 (1988).

9. Mar. 25, 1957, art. 85, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty]. Article 85 states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

Merger Regulation counterpart, can apply to the same joint venture where the jurisdictional predicates are met.¹¹ But joint ventures do not fit neatly into one category or the other. A risk to be avoided is overly rigid definitions that result in a blindered application of different "structural" and "behavioral" legal rules.

The issue in the United States, unlike in the EEC, has not been whether a joint venture should be treated as a merger or cartel; both statutes apply. Moreover, both statutes are applied by the same administrative and judicial bodies.¹² The theoretical risk of inconsistent results has generally been avoided. Section 7 of the Clayton Act has rarely been applied to joint ventures.¹³

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Id.

10. 15 U.S.C. § 18 (1988).

11. See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

12. The joint venture classification issue can be important under U.S. antitrust law in the determination of whether a per se prohibition rule or the rule of reason should be applied. Generally speaking, the per se rule applies to "cartels" and the rule of reason to all other agreements between competitors. Thus the joint venture classification might defeat a claim that a joint selling arrangement among competitors constitutes a per se violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1988). Here the classification can be determinative because application of the U.S. per se rule precludes the admissibility of evidence that the particular arrangement was justified, i.e. asserted efficiencies or other competitive benefits/justifications are rejected in principle once the court decides that the per se rule applies. However, the existence or likelihood of efficiencies can be used in the first instance to decide whether or not the rule of reason or per se rule applies to the general class of agreement at issue. This has prompted courts, commentators and the administrative agencies to flirt with a "quick look" or "truncated" rule of reason/per se analysis. See, e.g., PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* (1978). See generally Barry Hawk, *The American (Anti-trust) Resolution: Lessons for the EEC?*, 9 *EUR. COMPETITION L. REV.* 53 (1988). Market power is also not required for a per se violation.

13. There are only a handful of joint venture cases under section 7. See, e.g., *Penn-Olin*, 378 U.S. 158; *Brunswick Corp.*, 94 F.T.C. 1174 (1979), *aff'd sub nom. Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied sub nom. Bruns-*

This is not the situation in the EEC where the definition of a joint venture has far more practical importance. In the EEC the joint venture classification issue is relevant to the determination of whether the Merger Regulation rules and fast track procedures apply or whether the restrictive agreement/cartel rules and leisurely procedures under Article 85 apply.

The proper analysis must focus on three possible anticompetitive risks:

- (1) loss of actual or potential competition between the parents in the market in which the joint venture operates;
- (2) cartel or anticompetitive conduct between the parents in non-joint venture markets in which the parents compete (spillover effect), and
- (3) foreclosure of third parties.

Excluded are asserted anticompetitive effects or restrictions on competition between the parents on the one hand and the joint venture on the other. Competition between the parents and the joint venture should not be expected or postulated.

B. Two Obstacles to a Coherent EEC Analysis of Joint Ventures

An intellectually coherent and predictable analysis of joint ventures faces more serious problems under EEC law than under U.S. antitrust law, principally for two reasons. First, EEC law makes it necessary to determine whether the Merger Regulation or Article 85 applies to any given joint venture. Somewhere, a line has to be drawn. In fact, the line has been drawn in such a way that there is considerable confusion about the kind of joint ventures that are to be examined exclusively under the merger rules (so-called "concentrative" joint ventures) and those to be examined under Article 85 as cartel/

wick Corp. v. FTC, 456 U.S. 915 (1982). This has minimized the risk that an efficiency-enhancing joint venture would be approved as reasonable under section 1 of the Sherman Act and condemned under section 7 of the Clayton Act because of potential competition losses. For further elaboration, see 2 HAWK TREATISE, *supra* note 1, at 307-08. This risk has been considerably reduced, at least with respect to government enforcement. The U.S. Department of Justice has effectively combined section 1 and section 7 into a single analysis. See *Department of Justice Antitrust Guidelines for International Operations* §§ 2.1, 2.2, 3.4 (1988), reprinted in 1988 Trade Reg. Rep. (CCH) 5, 6, 41 (Extra ed. no. 24, Nov. 10, 1988) [hereinafter *Department of Justice Guidelines*].

restrictive agreements (so-called "cooperative" joint ventures). This almost metaphysical conundrum is discussed in part II.A below.

Second, Article 85's unfortunate bifurcation into paragraphs (1) and (3) (notification or nullity) and the resultant division of what should be a single antitrust analysis poses significant obstacles in the EEC treatment of joint ventures.¹⁴ The structural context (e.g., actual or potential competitive overlap of the parents, market shares, concentration data, entry conditions) is even more important in assessing the competitive harms and benefits of joint ventures than is true with respect to most other horizontal and vertical agreements. This thorny issue is studied in part III below.

II. JOINT VENTURES THAT ESCAPE ARTICLE 85

A. From the "Partial Merger" Imbroglia to the Metaphysical "Concentrative Joint Venture"

For most of the EEC's existence Article 85 did not apply to mergers and other "structural" arrangements.¹⁵ As there was no specific merger statute until 1990, only the abuse of dominant position provisions of Article 86¹⁶ were available to challenge mergers.¹⁷ Certain joint ventures were deemed "partial mergers" and thus escaped Article 85's cumbersome notification or nullity regime.¹⁸ But partial mergers were

14. EEC Treaty, *supra* note 9, art. 85.

15. From 1966 until the early 1980s this was the Commission position. This position was originally taken in a 1966 memorandum where the Commission overrode the initial opinions of outside experts. Karen Banks, *Mergers and Partial Mergers Under EEC Law*, in 1987 *FORDHAM CORP. L. INST.* 373, 375-84 (Barry Hawk ed., 1988); Christopher Bellamy, *Mergers Outside the Scope of the New Merger Regulation—Implications of the Philip Morris Judgment*, in 1988 *FORDHAM CORP. L. INST.* ch. 22 (Barry Hawk ed., 1989); see 2 *HAWK TREATISE*, *supra* note 1, at 950-51. This position was modified somewhat in 1987 with the Court of Justice's judgment in the *Philip Morris* case, where the Court declared that Article 85 does apply to minority shareholdings under certain circumstances. *British American Tobacco Co. and R.J. Reynolds Indus. v. Commission*, Joined Cases 142 & 156/84, [1987] E.C.R. 4487, [1988] 4 C.M.L.R. 24 [hereinafter *Philip Morris*]; see Bellamy, *supra*; Ernst-Joachim Mestmäcker, *Merger Control in the Common Market: Between Competition Policy and Industrial Policy*, in 1988 *FORDHAM CORP. L. INST.* ch. 20 (Barry Hawk ed., 1989).

16. EEC Treaty, *supra* note 9, art. 86.

17. See, e.g., *Europemballage Corp. and Continental Can Co. v. Commission*, Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199; see also 2 *HAWK TREATISE*, *supra* note 1, at 954.

18. See generally Banks, *supra* note 15.

found only "in exceptional cases" and most joint ventures were found to be cooperative and subject to Article 85. The Commission strictly required for a "partial merger" that (1) the parents completely and irreversibly abandoned the joint venture's market, and (2) competition was not weakened in other markets, particularly related markets, where the parents remained formally independent of each other.

The advent of the Merger Regulation has ushered in a new doctrinal mechanism to exclude "structural" joint ventures from the application of Article 85. The "partial merger" imbroglio has been transmogrified into the metaphysical concentrative-cooperative distinction. This distinction is intended to separate "concentrative" joint ventures that fall under the Merger Regulation from "cooperative" joint ventures that remain subject to the very different substantive rules and procedures under Article 85.

B. Joint Ventures Under the Merger Regulation

One perceived concern facing the drafters of the Regulation was to ensure that mergers and partial mergers (or concentrative joint ventures) do not fall outside the Merger Regulation simply because they involve some "cooperative" or collusive (cartel) aspects or risks. On the other hand, there was concern that an overly broad definition of a concentrative joint venture would result in too many arrangements between competitors escaping the stricter rules of Article 85 because the same concept of "concentration" applies above and below the Merger Regulation's size thresholds. Thus all "concentrations" below those thresholds have been put outside the scope of the Commission's enforcement powers under Regulation No. 17.¹⁹ This is similar to the policy concern which also underlay the Commission's narrow definition of a "partial merger."

The Merger Regulation distinguishes between "concentrative" and "cooperative" joint ventures. Concentrative joint ventures refer to transactions that lead to a lasting structural change in the participating firms. They are governed only by

19. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

the Merger Regulation and thus escape Article 85.²⁰ Cooperative joint ventures are those that represent a temporary coordination of competitive activities between two otherwise independent firms. Cooperative joint ventures do not fall under the Merger Regulation and are analyzed under Articles 85 and 86. It is thus extremely important to be able to distinguish between concentrative and cooperative joint ventures. Different statutes—and more importantly, different substantive rules, administrative procedures and deadlines—pertain depending on whether a joint venture is classified as concentrative or cooperative.

1. The Merger Regulation's Definition

The Merger Regulation defines a concentrative joint venture as one that "perform[s] on a lasting basis all the functions of an autonomous economic entity [and] which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture."²¹ Thus, in the broadest terms, the essential characteristics are: (1) a permanent structural change (lasting entity); (2) a fully-functioning entity, and (3) a lack of possible coordination of competitive behavior.

2. The Guidelines' Approach to Concentrative/Cooperative Joint Ventures

The merger guidelines amplify the definition of a concentrative joint venture.²² A joint venture is an undertaking: it must be "an organized assembly of human and material resources, intended to pursue a defined economic purpose on a long-term basis."²³

The joint venture for the purposes of the Merger Regula-

20. Merger Regulation, *supra* note 2, O.J. L 257/13 (1990). This is undoubtedly true with respect to concentrative joint ventures large enough to meet the Merger Regulation's presently very high thresholds. Smaller concentrative joint ventures also probably escape Article 85, although there remains some small doctrinal uncertainty on the point.

21. *Id.* art. 3(2), O.J. L 257/13, at 17, ¶ 2.

22. See Notice Regarding Concentrative and Cooperative Operations under Council Regulation No. 4064/89, O.J. L 395/1 (1989), on the Control of Concentrations Between Undertakings, O.J. C 203/10 (1990) [hereinafter Merger Guidelines].

23. *Id.* at 11, ¶ 8.

tion must be jointly controlled by other undertakings.²⁴ Control means the possibility of exercising, directly or indirectly, a decisive influence on the activities of the joint venture.²⁵ Joint control exists where the parents must agree on decisions concerning the joint venture's activities either because of the rights acquired in the joint venture or because of contracts or other means establishing joint control.²⁶ Despite a majority interest by one parent, there can still be joint control based on agreements or consultation between the parents.²⁷

Single control is generally the case where one parent owns more than half the capital or assets of the joint venture, has the right to appoint more than half of the managing or supervisory bodies, controls more than half of the votes or has the sole right to manage the joint venture's business. Significantly, if one parent's holding is insufficient to establish sole control and if there is no joint control with other parties, then there is no concentration within the meaning of the Regulation. The joint venture is deemed cooperative and falls within Article 85.²⁸

Once a jointly controlled undertaking has been found, it will only be a concentration governed by the Regulation where the conditions set forth in article 3(2) of the Regulation are met. The guidelines characterize these as a positive and negative condition.²⁹

To satisfy the positive condition, the joint venture must perform on a lasting basis all the functions of an autonomous economic entity. Specifically, the joint venture must act as an independent supplier and buyer on the market. Joint ventures that serve merely as auxiliaries to the commercial activities of their parents are not considered concentrations. Thus, where the joint venture supplies its products exclusively to the parents or meets its needs wholly from them, or even where it deals mostly with third parties but remains substantially dependent on the parents for maintenance and development of

24. *Id.* ¶ 9.

25. *Id.*

26. *Id.* ¶ 11.

27. *Id.* ¶ 13.

28. *Id.* ¶ 14.

29. *Id.* ¶ 15.

the joint venture's business, no concentration will be found.³⁰

A concentrative joint venture must also be able to carry on its activity for an unlimited or long period of time. This is measured by time and more importantly by the human and material resources contributed to the joint venture. Where the parents contribute substantial financial resources to the joint venture, transfer an existing business or give the joint venture substantial technical or commercial know-how, this evidences the parents' intent to ensure the joint venture's existence and independence in the long term.³¹

Finally, the joint venture must exercise its own commercial policy, with the parents restricted to the role of financially interested major shareholders who intervene in the joint venture's management only to protect their substantial investment. That the parents oversee the joint venture's general commercial policy or reserve to themselves the right to make decisions important for the development of the joint venture (mainly those concerning changes in the company's objectives, capital increases or reductions or application of profits) does not deprive the joint venture of its commercial independence. The guidelines note, however, that common membership of the joint venture and the parents' decision making bodies is at least an obstacle to commercial independence where the joint venture operates in the same market as its parents or in related markets.³²

The negative condition requires that "coordination" of competitive behavior either between the parents or between the parents and the joint venture not be the object or the effect of the joint venture's formation or activities.³³ There will normally be no foreseeable coordination when all the parent companies withdraw entirely and permanently from the joint venture's market and do not operate on markets neighboring those of the joint venture's. Even where the joint venture and

30. *Id.* at 11-12, ¶ 16.

31. *Id.* at 12, ¶ 17.

32. *Id.* ¶¶ 18-19.

33. The Merger Regulation does not define "coordination" or "risk of coordination." The terms are most appropriately understood in light of Article 85 of the EEC Treaty, which requires an appreciable restriction of competition. *See* EEC Treaty, *supra* note 9, art. 85. This suggests that the "risk of coordination" necessary to exclude the Merger Regulation means risk of an appreciable restriction of competition under Article 85(1).

parents operate in adjacent markets, the risk of coordination will be relatively small where the parents limit the influence they exercise to the joint venture's strategic decisions, such as those concerning the future direction of investment, and when they express financial, rather than market oriented, interests.³⁴

The guidelines recognize that joint control is inconceivable without an understanding between the parents regarding their interest in the joint venture, and thus not every form of cooperation between the parents places the joint venture outside the Regulation. The decisive factor is existence of potential competition between the parents and the joint venture, i.e., whether there are direct or indirect, actual or potential, effects of the formation and operation of the joint venture on market relationships.³⁵

34. Merger Guidelines, *supra* note 22, O.J. C 203/10, at 12, ¶ 20 (1990).

35. *Id.* ¶ 21. The guidelines set forth four examples to illustrate the dividing line between those cases where there will be a likelihood of coordination and those where there will not.

Case 1 is a joint venture that takes over pre-existing activities of the parents. *Id.* at 13, ¶ 24(a). This type of joint venture is concentrative where the parent companies withdraw permanently from the joint venture's market. A concentrative joint venture is also possible where the parents withdraw from the joint venture's market (i.e. Europe) but remain permanently active in another widely separated geographic market (i.e. East Asia). The guidelines suggest, however, that a joint venture would probably be considered cooperative where the markets of the parent and the joint venture are in different parts of the Community or in neighboring third countries. *Id.* ¶¶ 25, 29-30.

The parents' withdrawal from the joint venture's market may occur over a short transitional period intended to overcome start-up problems for the joint venture, such as bottlenecks in production or supply. This period should not normally exceed one year. Withdrawal from the joint venture's market is not sufficient, however, to make a joint venture concentrative. The guidelines state further that neither parent may remain an actual or potential competitor of the other or of the joint venture, and that there must be no spillover effect in other markets. *Id.* ¶¶ 28-29.

Case 2 concerns a joint venture that undertakes new activity on behalf of the parents. *Id.* ¶ 24(b). This is normally concentrative where the parents, individually have not entered the joint venture's product market and will not enter in the foreseeable future because they lack the organization, or the technical or financial means. This is true, however, only if the joint venture's market is neither upstream, nor downstream nor neighboring to that of the parents. *Id.* at 13-14, ¶ 31.

Under Case 3, a joint venture which involves entry into a geographic and product market is presumptively cooperative where the parents (or one of them) remain active in the joint venture's market or remain potential competitors of the joint venture. *Id.* ¶¶ 24(c), 33.

Case 4 considers, among other transactions, joint ventures operating in markets upstream, downstream or neighboring to that of the parents. *Id.* at 13, ¶ 24(d). In general, if the parents compete in upstream or downstream markets there is a risk of

3. Separable and Ancillary Restrictions

As mentioned above, the drafters of the Regulation were concerned to ensure that joint ventures do not fall outside the Merger Regulation simply because they have some "cooperative" aspects. There was also concern that a transaction generally approved under the Regulation should not be undone through the imposition of Article 85 nullity on restrictive clauses in the relevant agreements.

The Commission has attempted to meet these concerns and to introduce flexibility through the separability provision. The guidelines provide that transactions which include both a structural change and the coordination of competitive behavior fall outside the Regulation where the two are not "separable." If the structural change can be separated from the "coordination" of competitive behavior, the former will be assessed under the Regulation and the latter, to the extent that it does not amount to an ancillary restriction, will be examined under Articles 85 and 86.³⁶

4. Commission Decisions

In the first ten months since the Regulation has been in effect, twenty-five joint ventures have been notified. The Commission found twenty-one to be concentrative, three to be cooperative and one, *Renault/Volvo*,³⁷ concentrative in part and cooperative in part. The first year of Merger Regulation decisions permits several preliminary conclusions about the Commission's valiant attempt to distinguish joint ventures that are subject to the Regulation from those that are subject to Article 85.

Early fears when the guidelines were issued that the Commission would take a strict view of what constitutes a concentrative joint venture in order not to be flooded with notifications have proven unfounded. The Commission appears quite

coordination. If they are not competitive, normally there is such a risk only where the joint venture's sales or purchases are made in substantial measure with the parents. *Id.* at 14, ¶ 35.

36. See Donald Holley, *Ancillary Restrictions in Mergers and Joint Ventures*, in 1990 *FORDHAM CORP. L. INST.* 423 (Barry Hawk ed., 1991).

37. Slip op. (Eur. Comm'n Nov. 7, 1990), cited in O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

willing to find concentrative joint ventures in doubtful cases.³⁸

The decisions have refined considerably the notion of "joint control." The guidelines recognize that even if one parent has a majority share, joint control can still exist if there are provisions for joint decision making. The decisions repeatedly show that the Commission is willing to find that joint control exists, regardless of the percentage interest, where the parents share the critical strategic decisions.

For example, in *Conagra/IDEA*³⁹ the Commission found that Conagra and IDEA's parent company would jointly control IDEA, even though Conagra acquired only 20 percent of IDEA's capital shares and 26 percent of the voting rights. The acquisition agreement provided that Conagra's assent would be required on issues such as the approval of the annual budget and strategic plans, significant deviations from the budget or plans, approval of all major investments, the launching of new products, and the hiring and remuneration of senior executives.⁴⁰ Other cases have reached similar results where two parties forming a new entity were required to have equal input and assent on major decisions despite the uneven ownership interests.⁴¹

38. See, e.g., *BNP/Dresdner Bank—Czechoslovakia*, slip op. (Eur. Comm'n Aug. 26, 1991), cited in O.J. C 226/28 (1991), [1991] 4 C.M.L.R. 818.

39. Slip op. (Eur. Comm'n May 30, 1991), cited in O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580.

40. See *Elf/BC/Cepsa*, slip op. (Eur. Comm'n June 18, 1991) (34 percent/34 percent and veto rights over major decisions), cited in O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; see also *Péchiney/Usinor-Sacilor*, slip op. (Eur. Comm'n June 24, 1991) (66 percent/34 percent participation), cited in O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580.

41. E.g., *Aérospatiale/MBB*, slip op. (Eur. Comm'n Feb. 25, 1991) (60 percent/40 percent participation), cited in O.J. C 59/13 (1991); see *Varta/Bosch*, O.J. L 320/26 (1991); Commission Press Release IP (91) 766 (July 31, 1991) (65 percent/35 percent participation in *Varta/Bosch*); see also *Sanofi/Sterling Drug*, slip op. (Eur. Comm'n June 10, 1991) (where parties formed several joint ventures, unequal representation on joint ventures' boards was outweighed by requirement that two representatives of each party vote on certain topics), cited in O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

See also *KELT/American Express*, slip op. (Eur. Comm'n Aug. 20, 1991), cited in O.J. C 223/38 (1991), [1991] 4 C.M.L.R. 740, where the Commission found that a consortium of eight banks which formed an entity to acquire an oil and gas firm was a concentrative joint venture, and noted that even though one bank was the lead, unanimity was required among the eight for central strategic decisions.

A different result was reached in *Usinor/ASD*,⁴² where Usinor's majority acquisition of ASD did not constitute joint control simply because certain board decisions were required to be unanimous. Those decisions related solely to the protection of the rights of the minority shareholders and not to the management of the company. This last distinction is the one which the Commission tries to draw in joint control cases.

Initial hopes based on the first decision, *Renault/Volvo*, that the economic integration of the parents' operations would be the most important factor in determining whether a joint venture is concentrative, have not been borne out. Although neither the Merger Regulation nor the guidelines expressly mention economic integration, the combining of resources by two firms is the fundamental economic rationale differentiating mergers from cartels. Integration is the linchpin of the U.S. Justice Department's distinction between merger/joint venture analysis and per se cartel treatment. The extent of economic integration certainly plays a less central role under the Merger Regulation than it does in the Justice Department's joint venture analysis. Integration under the Merger Regulation serves a secondary function of demonstrating that the parties have permanently withdrawn from the joint venture's market or that "autonomy" is ensured. Thus, integration has a more formalistic role than in the Justice Department's analysis, where integration rests on the presumption that economic efficiencies arise from the integration of research and development ("R & D"), production and distribution resources.

The Commission has focused on integration in several decisions. In *Renault/Volvo* integration was an important factor in determining that the trucks and buses joint venture was concentrative while the automobile joint venture was cooperative. In addition to 45 percent cross-shareholdings, the concentrative aspect of the truck/bus joint venture was confirmed by the legally binding agreement to integrate the parties' activities, including development, production, purchasing and product and marketing strategies. This was said to lead to an "irreversible reciprocal dependency" between the two firms ensuring the permanence of the joint venture since it would involve an

42. Slip op. (Eur. Comm'n Apr. 29, 1991), cited in O.J. C 193/34 (1991), [1991] 4 C.M.L.R. 663.

expensive competitive setback for either firm to withdraw from the joint venture and enter the market independently. Failure to integrate fully at the marketing level did not change the result. The parties planned to maintain separate trade names and distribution networks. The Commission recognized that, apart from the fact that this was necessary to maintain the parties' existing positions on the market, all strategic decisions relating to marketing and distribution would be made jointly.

The automobile joint venture, on the other hand, was not concentrative. It involved only 25 percent cross-shareholdings and, more importantly, the parties were not obligated to integrate all product ranges of their respective businesses. In case of conflicting interests, each party could easily leave the venture and act independently.⁴³

The guidelines' emphasis on "autonomy" is not reflected in the decisions. It is mentioned in only two decisions.⁴⁴ The requirement that the joint venture perform on a lasting basis all the functions of an autonomous economic entity is readily satisfied where the parents contribute their entire businesses to a joint venture.⁴⁵

The Commission has also been willing to find that a joint venture is fully functioning where the joint venture is not entirely self-sufficient or autonomous. In *Varta/Bosch*,⁴⁶ for ex-

43. In *Sanofi/Sterling Drug*, slip op. (Eur. Comm'n June 10, 1991), cited in O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739, the parties established a worldwide "alliance" consisting of several joint ventures. In finding the ventures concentrative, the Commission noted that the parties in each venture would combine their existing manufacturing, administration, marketing, sales, distribution and support operations and that the management structures of the joint ventures would be fully integrated.

44. See *Mitsubishi/UCAR*, slip op. (Eur. Comm'n Jan 4., 1991), cited in O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245; *Varta/Bosch*, "Europe" No. 5547, at 9 (Aug. 2, 1991).

45. See *Aérospatiale/MBB*, slip op. (Eur. Comm'n Feb. 25, 1991) (parents transferred whole of their helicopter activities to new company), cited in O.J. C 59/13 (1991). In many cases, the Commission merely states in a conclusory fashion that the joint venture is fully functioning. See, e.g., *Dräger/IBM/HMP*, slip op. (Eur. Comm'n June 28, 1991), cited in O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817; *Péchiney/Usinor-Sacilor*, slip op. (Eur. Comm'n June 24, 1991), cited in O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; *Elf/BC/Cepsa*, slip op. (Eur. Comm'n June 18, 1991), cited in O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; *Conagra/IDEA*, slip op. (Eur. Comm'n May 30, 1991), cited in O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; *ASKO/Omni*, slip op. (Eur. Comm'n Feb. 21, 1991), cited in O.J. C 51/12 (1991), [1991] 4 C.M.L.R. 330; *Mitsubishi/UCAR*, slip op. (Eur. Comm'n Jan. 4, 1991), cited in O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

46. O.J. L 320/26 (1991).

ample, the Commission found that the joint venture was fully-functioning in that it was responsible for development, production and sales. The fact that one of the parents would continue to distribute the product for the joint venture did not detract from the stand-alone aspects of the joint venture because the parent would do so only as an agent of the joint venture.⁴⁷

The Commission's benign neglect of "autonomy" is praiseworthy given the theoretical and operational weaknesses of "autonomy" as a factor in determining whether a joint venture should be treated as a merger or cartel. The theoretical difficulty with the autonomy factor is that it bears little to no relation to the substantive antitrust concerns. For example, assume that parents who remain actual or potential competitors in the joint venture's market form a highly autonomous venture. The mere fact of the autonomy does not tend to alleviate competitive concerns. The parents, in their own interests determined unilaterally, may rationally decide not to compete at all or as vigorously in the joint venture's market. Conversely, if the joint venture is not autonomous but the parents have withdrawn from the joint venture's market and therefore are no longer actual or potential competitors, the lack of autonomy should not detract from the otherwise concentrative elements. Autonomy of the joint venture is relevant to the spill-over risk. However, it would be better to focus the inquiry directly on the risk, which cannot be assessed only by asking questions about the joint venture's autonomy.

47. Similarly, in *Sanofi/Sterling Drug*, slip op. (Eur. Comm'n June 10, 1991), cited in O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739, the parties transferred or licensed on a permanent basis their existing production, distribution and marketing capabilities. The Commission found that the fact that the R & D functions, which are extremely important to an ethical drug business, would remain with the parents and not be contributed to the joint venture, did not mean that the joint venture was not fully functioning. This was because the joint venture agreement established a mechanism through which the parents would decide jointly whether a new product should be developed. If the parents decided against joint development, the parties could not continue development individually. They could only assign or license their rights to third parties.

Compare *Baxter/Nestlé/Salvia*, slip op. (Eur. Comm'n Feb. 6, 1991), cited in O.J. C 37/11 (1991), [1991] 4 C.M.L.R. 245, where the Commission determined that there was no concentration, noting among other things that there was "considerably reduce[d] autonomous status" because the joint venture was dependent on know-how licensed from the parents, which licenses could be easily withdrawn.

Merger Task Force members have intimated publicly and privately that the decisions provide a more reliable source of the Commission's enforcement policy than the guidelines. It is not clear whether Commission dissatisfaction with the guidelines rests on theoretical doubts or practical/administrative difficulties in applying them. In any event, biblical exegesis of the guidelines is not helpful in predicting the Commission's reaction to a notified transaction.

Many Commission decisions can better be understood under the old "partial merger" theory, which is perhaps being resurrected *faute de mieux*. Certainly many Commission decisions seem to focus the inquiry on the same two factors: (1) whether one (or both) parents have permanently withdrawn from the joint venture's market, and (2) whether there are any spillover anticompetitive effects outside the joint venture's market. These factors are certainly appropriate because they concern two of the three competitive risks: loss of actual or potential competition in the joint venture's market, and "spillover" collusion/cartel effects in other markets.⁴⁸

Non-compete clauses by the parents in favor of the joint venture are considered evidence of withdrawal.⁴⁹ Even in some of the less straightforward cases, the Commission has been willing to countenance some product overlap or remote potential competition, provided there is no *realistic* possibility of competition between the parents and the joint venture in the joint venture's market. In *Mitsubishi/UCAR*,⁵⁰ for example, Mitsubishi agreed to withdraw from the market for carbon and graphite products in Europe where the joint venture would operate, but maintained a certain position in the market in Japan. The Commission found that because (1) Mitsubishi was merely a trader in the product (as opposed to a producer), (2) its posi-

48. The foreclosure concern is not always present. When it is, the Commission also examines it in addition to the two factors in the text.

49. See, e.g., *Conagra/IDEA*, slip op. (Eur. Comm'n May 30, 1991) (no risk of coordination where Conagra had no activities in relevant market and agreed not to enter market other than through joint venture), cited in O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; *ASKO/Omni*, slip op. (Eur. Comm'n Feb. 21, 1991) (parents and joint venture did not compete, and non-competition agreement confirmed parents' intentions to abstain from joint venture's market), cited in O.J. C 51/12 (1991), [1991] 4 C.M.L.R. 330.

50. Slip op. (Eur. Comm'n Jan 4, 1991), cited in O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

tion in Europe was negligible (.01 percent), and (3) UCAR, of which Mitsubishi would now own 50 percent, was the largest market participant in the EEC and worldwide, Mitsubishi was not likely to be interested in reentering the market. Mitsubishi's non-compete agreement reflected this reality and was viewed by the Commission as a "lasting withdrawal from the EC markets."⁵¹

Similarly, in *Sanofi/Sterling Drug*⁵² the parties established several joint ventures, two of which concerned ethical drugs and the third over-the-counter ("OTC") drugs. In finding the joint ventures concentrative, the Commission noted that the "alliance" established by the parents left no room for coordination of competitive conduct. With regard to the ethical businesses, the parents had placed all their interests in the joint venture. With respect to the OTC business, although Sterling maintained independent operations in the United States, the Commission found that there was no "realistic possibility" that Sterling would reenter Europe because it had transferred all of its assets and essential rights (e.g., trademark and product registrations in Europe) to the OTC venture.⁵³

Another case demonstrating the Commission's willingness to adjudge joint ventures concentrative because parents have withdrawn from the joint venture's market and probably *will not* (although they *could*) reenter that market is *Dräger/IBM/HMP*.⁵⁴ Three firms established a joint venture to develop and market computerized intensive health care and patient data management systems. The Commission found that IBM, as

51. *Id.* ¶ 8.

52. Slip op. (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

53. The decision in *Elf/BC/Cepsa*, slip op. (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580, reflects a similar analysis. BC, a banking firm, and Elf, a firm involved in the exploration of hydrocarbons, entered into an agreement enabling them to control jointly Cepsa, a firm involved in the exploration, production and development of petroleum products. The Commission found that there was no coordination of competitive behavior between the parents or between them and the joint venture because (1) the bank was not likely to enter the joint venture's market, (2) neither Elf nor Cepsa was likely to enter the other's market (petroleum versus hydrocarbons) because the structures of the markets were very different, (3) Elf and Cepsa had only limited activities in each other's geographic markets, and (4) Elf granted the joint venture a license to its trademark.

54. Slip op. (Eur. Comm'n June 28, 1991), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817.

well as the other parents, were not "realistic potential competitors" because reentry would not be commercially reasonable. Not only would there be substantial costs and risks, but the parents' non-compete obligations would not permit entry for eighteen months resulting in late (and therefore presumably ineffective) reentry.⁵⁵

When reentry by the parents is more likely, a concentrative joint venture will not be found. In *Apollinaris/Schweppes*⁵⁶ there was no concentration because the parents only partially withdrew from the joint venture's market for the sale of mineral water and soft drinks in certain European countries. Because both parents remained in the same product market, the joint venture would be "likely to lead to a division of markets."⁵⁷ The Commission further found that Schweppes would remain a competitor of Apollinaris in Germany notwithstanding its agreement to transfer the whole of its beverage business in Germany, including production facilities and machinery, to the joint venture. Since the German market was growing and Schweppes had the know-how to enter because of its continued business activities outside of Germany, reentry would be commercially feasible.⁵⁸

As it does in its approach under Article 85(1), the Commission continues to speak of coordination or restrictions between the parents on one side and the joint venture on the

55. *But see* BNP/Dresdner Bank—Czechoslovakia, slip op. (Eur. Comm'n Aug. 26, 1991) (finding that agreement by two EEC banks to control Hungarian banking corporation to finance foreign trade transactions in Hungary was concentrative because two EEC parents were not active in special sector on Hungarian market; Commission did not address potential competition issue), *cited in* O.J. C 226/28 (1991), [1991] 4 C.M.L.R. 818.

56. Slip op. (Eur. Comm'n June 24, 1991), *cited in* O.J. C 203/14 (1991). The joint venture was later approved under Article 85, after some modifications.

57. *Id.* ¶ 9.

58. To the same effect is *Baxter/Nestlé/Salvia*, slip op. (Eur. Comm'n Feb. 6, 1991), *cited in* O.J. C 37/11 (1991), [1991] 4 C.M.L.R. 245. A concentration was not found because, among other things, both parents remained active in the market of the joint venture through their participation in a prior cooperative joint venture. In addition, both parents were active in closely related markets that the parents had excluded from the joint venture's permissible field of activities. These factors created a likely risk of coordinated activity between the various ventures, including the allocation of product and geographic markets.

Accord Elf/Enterprise, slip op. (Eur. Comm'n July 24, 1991) (finding no concentration where parents will continue their activities in same market in which joint venture will operate), *cited in* O.J. C 203/14 (1991).

other. This is inappropriate. Continuing competition between the parents and the joint venture in the joint venture's market after the joint venture's formation should not be expected. Formation of the joint venture itself may be considered as eliminating competition between the parents and the joint venture in the joint venture's market. This loss of competition is measured in the structural and essentially "merger" analysis of the effects in the joint venture's market.

In non-joint venture markets the situation is more complicated. In those markets the principal antitrust concern is the risk of collusion or anticompetitive conduct between the parents, i.e. the so-called spillover effect. Whether one should expect or encourage competition between the parents and the joint venture in product or geographic markets not originally given to the joint venture is problematic. The answer may depend on whether antitrust laws should be used to limit firms' freedom to create joint ventures limited to specific product/geographic markets when the parents have competing operations in other markets. In the EEC, the market integration policy goal suggests constraints on firms' freedom to restrict joint ventures from competing against the parents in other Member State territories not originally given to the joint venture.

The concentrative-cooperative distinction serves a mainly jurisdictional function. It assigns a particular joint venture to different substantive and procedural systems.⁵⁹ As a jurisdictional rule, the distinction is woefully inadequate. Jurisdictional rules must provide quick and predictable outcomes. In this respect the concentrative-cooperative distinction remains deeply flawed, despite the pragmatic efforts of the Commission to make sense of it. As this author and others predicted, the

59. The concentrative-cooperative distinction not only allocates jurisdiction within the EEC system between Articles 85 and 86 and the Merger Regulation. The distinction can also effectively determine whether Member State antitrust and merger control laws will apply to a particular transaction. Indeed, the mushrooming of merger control in Europe suggests the necessity of a Europe-wide antitrust strategy for acquisitions, mergers and joint ventures. The concentrative-cooperative distinction can play an important role in that strategy. Transactions can be structured to fall within or escape certain jurisdictions. For example, joint ventures may be made more "concentrative" in order to fall within the exclusive jurisdiction of the EEC and thus avoid Member State merger controls and national mini-Article 85s. For a fuller discussion, see Barry Hawk, *European Merger Control—National Laws and Enforcement Policies* (forthcoming).

concentrative-cooperative distinction has increased legal uncertainty and transaction costs.⁶⁰ To speak frankly, a ridiculous amount of Commission, counsel and business time is devoted to a jurisdictional issue that should be easily determinable. Even if, like obscenity, one simply knows it when one sees it,⁶¹ firms and their business and legal advisers can take little comfort. Unfortunately, the first year of decisions has not seriously changed my characterization of the distinction made before the Regulation became effective: (1) even experienced antitrust lawyers will be unable to apply the distinction with confidence; (2) economists will see it as another example of the perversions lawyers make of economics, and (3) tax lawyers and accountants who make their livings on formalisms will accept the distinction with no apparent discomfort.

The Commission continues its valiant but largely Sisyphean effort to make sense of the concentrative-cooperative joint venture distinction. The distinction is theoretically flawed. It exaggerates both the importance and the clarity of the economic distinction between structure and behavior. While it is true that industrial organization economics makes a distinction between structure and behavior, it does not support an either/or legal distinction that results in either the application of a structural merger control test or a behavioral cartel test. The Merger Regulation decisions themselves indicate an acute Commission sensitivity to the behavioral aspects of concentrations. This can be seen in the Commission's willingness to condition clearances of mergers and concentrative joint ventures on what are clearly behavioral remedies or conditions.⁶²

If war is too important to be left to the generals, then the allocation of jurisdiction over joint ventures is too important to be left to the theorists. Very important practical consequences flow from the concentrative-cooperative distinction. To over-

60. Barry Hawk, *Concentrative/Cooperative Joint Ventures: Metaphysics and the Law* (forthcoming).

61. Such was the jocular but sincere description of the German law distinction by a highly experienced Bundeskartellamt official. Panel Discussion, *Notification Requirements and Procedures under National Merger Laws Discussion*, in 1990 FORDHAM CORP. L. INST. 269, 279 (Barry Hawk ed., 1991) (remarks of Kurt Markert); cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

62. See, e.g., *Alcatel/Telettra*, O.J. L 122/48 (1991), [1991] 4 C.M.L.R. 778; *Fiat Geotech/Ford New Holland*, slip op. (Eur. Comm'n Feb. 8, 1991) (exclusive distributorship remedy decision), cited in O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

simplify somewhat, as a joint venture leaves the high-tech, deadline-driven world of the Merger Task Force, one moves to the more leisurely, scarce-resources world of the operating divisions of DG IV. The solution is not to continue to engage in the metaphysics of refining and re-refining the concentrative-cooperative distinction. The best solution is to provide a unified analysis of joint ventures that includes both behavioral and structural considerations. If this cannot be done under the existing legislation, which appears to be the case, then the second best solution is to eliminate administrative and procedural differences to the extent possible between an examination of an arrangement under the Merger Regulation and a joint venture under Article 85.

III. *APPLICATION OF ARTICLE 85(1) TO COOPERATIVE JOINT VENTURES*

A. Introduction

The original sin in EEC competition law was the bifurcation of Article 85 with Regulation No. 17's conferral of exclusive competence on the Commission to grant exemptions.⁶³ As Jonathan Faull points out, EEC competition law and policy have reached maturity.⁶⁴ It is time to decentralize enforcement. Continued exclusive Commission competence to grant exemptions is no longer necessary and stands in the way of decentralization.

The intellectual and practical difficulties arising from the Article 85 bifurcation are seriously aggravated by the Commission's traditional Article 85(1) approach under which an overly broad definition is given to restrictive agreements. Most arrangements between competitors of any size having the faintest competitive interest are unenforceable unless notified and blessed by the Commission.⁶⁵ By placing most joint ven-

63. EEC Treaty, *supra* note 9, art. 85; Council Regulation No. 17/62, art. 9(1), 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 89.

64. Jonathan Faull, *The Enforcement of Competition Policy in the European Community: A Mature System*, 15 *FORDHAM INT'L L.J.* 219 (1991-1992).

65. The handful of exceptions have been created by the Court of Justice, usually over the objections of the Commission.

The Notice on Agreements of Minor Importance, O.J. C 231/2 (1986), and the 1968 Notice on Agreements, Decisions, and Concerted Practices Concerning Cooperation Between Enterprises, J.O. C 75/3 (1968), *corrected by* J.O. C 84/14 (1968),

tures of more than *de minimis* size under Article 85(1), the Commission effectively requires parties to obtain an exemption under Article 85(3) or run the risk of nullity and fines. The inadequacy of Commission resources to deal with the resulting notifications has caused considerable delays and legal uncertainty. Indeed, the integrity and credibility of the EEC notification system is called into question. Conventional wisdom has it that the great majority of joint ventures are not notified even where a Commission blessing in the form of a comfort letter or exemption decision could be expected.

Full function joint ventures provide the most glaring and important examples of the failure of the notification or nullity system.

B. *Application of Article 85(1) to Joint Venture Formation*

The Commission's decisions can be read by an optimist to suggest a gradual evolution of Commission analysis under Article 85(1) toward a fuller and more vigorous analysis of the joint venture's competitive effects in the joint venture's market and in so-called spillover markets. The evolution is uneven and comes in considerable fits and starts. Some decisions clearly strike new paths or leaps forward, such as *Mitchell Cotts/Sofitra*,⁶⁶ *Elopak/Metal Box—Odin*⁶⁷ and *GEC-Siemens/Plessey*.⁶⁸ As expected, these decisions are hailed by happy observers as heralding new eras.⁶⁹ But like biological evolution, throwbacks occur; for example, a 1991 decision may contain bits and pieces of the early "inherent restrictions" rationale.⁷⁰

In many earlier decisions, the Commission applied Article 85(1) to the *formation* of joint ventures solely on the basis that the parents were actual or potential competitors in the joint venture's market.⁷¹ An early statement of the Commission's

offer little to no comfort with respect to fuller-function joint ventures between firms of significant size.

66. O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111.

67. O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832 [hereinafter *Odin*].

68. O.J. C 239/2 (1990).

69. See James S. Venit, *Oedipus Rex: Recent Developments in the Structural Approach to Joint Ventures Under EEC Competition Law*, WORLD COMPETITION, Mar. 1991, at 5.

70. See KSB/Goulds/Lowara/ITT, O.J. L 19/25, at 31, ¶ 17 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC 2009, 2016-17. For further discussion, see *infra* section III.C.

71. Express restrictions on the parents and/or the joint venture have also trig-

reasoning was given in *GEC-Weir Sodium Circulators*:

Even in the absence of express provisions, the creation of a joint venture generally has a notable effect on the conduct of parent parties Within the field of the joint venture and in related fields such parties are likely to coordinate their conduct and be influenced in what would otherwise have been their independent decisions and activities. Where the parent parties are actual or potential competitors, their participation in a joint venture is accordingly likely to impair free competition between them, regardless of the existence of explicit restrictive provisions to that effect.⁷²

Emphasis on actual and potential competition between the parents is essential. The competitive relationship between the parents is the most important single factor in the antitrust analysis of joint ventures. The existence and extent of actual/potential competitive overlap is highly relevant to assessing the three competitive risks associated with joint ventures: (1) loss of actual or potential competition in the joint venture's market (widgets in France); (2) cartel (e.g., price fixing) or other anticompetitive behavior between the parents in non-joint venture markets (widgets in Germany or gadgets in France), and (3) foreclosure of third parties.

Many Commission decisions are flawed by an anemic economic analysis. Particularly in earlier decisions, there was only a bare finding that the parents were actual or potential competitors. Little appeared in the decisions to demonstrate the extent and importance of that competition (e.g., market shares or other indicia of competitive importance). Invocation of largely vacuous concepts like "inherent" restrictions masked the absence of rigorous analysis.⁷³ This situation has improved con-

gered Article 85(1), such as covenants not to compete, exclusive supply/purchase agreements between the joint venture and the parents, and restrictive licensing conditions. Express restrictions ordinarily should not be used to invalidate formation of the joint venture. Much of the earlier confusion surrounding the role of express restrictions has been dissipated through a more refined use of the ancillary restraints doctrine. See *infra* section III.C.

72. O.J. L 327/26, at 31 (1977), [1976-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,000, at 10,136.

73. For example, elimination of actual competition between the parents has been declared an "inherent" restriction sufficient in itself to trigger Article 85(1). See, e.g., *Rockwell/Iveco*, O.J. L 224/19 (1983), [1983] 3 C.M.L.R. 709, and *Olivetti/Canon*, O.J. L 52/51 (1988), [1985-1988 Transfer Binder] Common Mkt.

siderably since the mid-1980s, mostly through an attempt to make a "more realistic" appraisal of the potential competition issue. In its *Thirteenth Report on Competition Policy*, the Commission set forth a checklist of four sets of "objective" questions relevant to such assessment, which related to the input and production of the joint venture, sales by the joint venture, and the risk factor.⁷⁴

Potential competition analysis is not limited, of course, to examination of joint ventures under Article 85. The same analysis applies under the Merger Regulation where the decisions evidence an increasing sophistication and willingness to engage in a fuller analysis of the potential competition issues.

A more rigorous analysis of the competitive relationship between the parents⁷⁵ is a necessary but not sufficient condition of a satisfactory application of Article 85. The absence of actual or potential competition between the parents is certainly an effective tool to filter out joint ventures from Article 85's application. This is what the Commission has done in the *Mitchell Cotts* general rule that joint ventures fall outside Article 85(1) where the parents are not actual or potential competitors.⁷⁶

An informed analysis should not stop, however, with the finding that the parents are actual or potential competitors, no matter how well based is that finding. This is as true for joint ventures as it is for mergers. All relevant structural factors must then be considered in determining whether there is an "appreciable" restriction of competition resulting from formation of the joint venture. These include market shares of the parties and other competitors, concentration data, and entry conditions. These structural factors are relevant to all three

Rep. (CCH) ¶ 10,961, where collaboration in production was found to imply that the parents would no longer compete in the manufacture and sale of the concerned products.

74. See COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY 50-52 (1984).

75. The competitive relationship between the parents on one side and the joint venture on the other side is not relevant, because neither actual nor potential competition should be expected between them.

76. *Mitchell Cotts/Sofitra*, O.J. L 41/31, at 35, ¶ 19 (1987), [1988] 4 C.M.L.R. 111, 119-20. There are two exceptions: (1) when the parents have substantial market power in adjacent markets and there is the risk of third party foreclosure, or (2) when a network of joint ventures exists that threatens market integration or otherwise has anticompetitive effects.

antitrust concerns noted above. The spillover concern requires that the structural factors be supplemented with other facts relevant to assessing the risk that the parents will cartelize or engage in other anticompetitive conduct in non-joint venture markets (e.g., prior history of price fixing, indicia of a collusion-prone industry, or existence of other links between the parents).

Several Commission decisions and enforcement actions in the last two years indicate some movement toward a less anemic Article 85(1) structural analysis. The most robust analysis, accomplished under the rubric of "appreciable" effect on competition, unfortunately is found in a procedural context that does not ensure the same "precedential" weight as a Commission decision. In *GEC-Siemens/Plessey* the Commission published a comfort letter clearing under both Article 85(1) and 85(3) the joint bid by two competitors for a third competitor, with the subsequent division of the target's businesses.⁷⁷

GEC-Siemens/Plessey does not draw a clear line between Article 85(1) and 85(3). Reasoning and factors used to support the conclusion that Article 85(1) did not apply were also used to explain why the agreement would be exemptable under Article 85(3). Arguably, the Commission wanted to reserve the possibility to use both options, and it remains to be seen whether the Commission's rather generous interpretation of the term "appreciable" will be applied in other cases.

GEC and Siemens made a joint hostile bid for a wide range of Plessey's business sectors, including telecommunications, traffic control systems, integrated circuits and defense-related products. Parts of the agreement were exempted under Article 85(3) and others were found to fall outside Article 85(1).

In the telecommunications sector, Plessey's and GEC's joint venture was reorganized with GEC owning 60 percent and Siemens owning 40 percent; joint agreement was required for all major decisions. The Commission found the restriction appreciable as far as public switching systems, large private switching systems and transmission systems were concerned.⁷⁸

77. O.J. C 239/2 (1990).

78. *Id.* at 3, ¶ 19. The restrictions were nevertheless deemed exemptable under Article 85(3), primarily because of very high R & D costs. The cooperation between

As to small private switching systems, the restrictions on competition were not likely to be appreciable enough to fall under Article 85(1) because of the growing number of competing suppliers and the existing competition in the United Kingdom.⁷⁹

The Commission concluded that no appreciable restriction would result from Siemens's acquisition of Plessey's traffic control business.⁸⁰ Plessey had not been active in the German market and Siemens did not sell appreciable quantities in the United Kingdom. The two companies did not compete in any other market within the EEC.⁸¹ The market was also characterized by the powerful position of purchasers which could impose systems specifications on the suppliers. But the Commission also declared that Article 85(3) was satisfied because of benefits in production and distribution of goods and technological progress.⁸²

GEC-Siemens/Plessey provides the most robust structural analysis of a joint venture under Article 85(1) to date. The following factors were considered: the relative market shares of the parties; their general size and importance; the height of barriers to entry; competition from other suppliers; actual and potential competition from outside the EEC, particularly from Japanese suppliers with the marketing capability to increase Community sales; countervailing power of purchasers (national monopsonies); the large number of competitors at the EEC level, even though there was only one in each Member

the two acquiring companies would enable the two companies to share their know-how and spread R & D costs. This was the only way for the two companies to compete with other major market participants. The most powerful competitors were NTT, AT&T and Northern Telecom.

The same rationale was applied to the integrated circuit business that was also found to be exemptable under Article 85(3), although the Commission mentioned that Article 85(1) might not apply because of the low market shares of the parties. *Id.* at 5, ¶¶ 26-27.

79. *Id.* at 3, ¶ 19. As to surface acoustic wave devices, the Commission concluded that other major competitors would make it unlikely that the joint venture could have an anticompetitive effect and infringe Article 85(1). *Id.* at 6, ¶ 35. This result was supported by the fact that Plessey and Siemens acted to a certain extent in different product areas.

80. *Id.* at 7, ¶ 38.

81. The market was highly concentrated at the level of national markets, but fragmented at the Community level.

82. The Commission relied exactly on the same reasons as it used for its conclusion that the agreement fell outside Article 85(1).

State; the need for international alliances or a stake in a local competitor to penetrate another national market, and specialization by the parties.

Another recent decision which considers structural factors is *Odin*.⁸³ The decision is important primarily for its extension of the *Mitchell Cotts* rule, i.e., that restrictions ancillary to a joint venture that fall outside Article 85(1) generally also fall outside Article 85(3).⁸⁴ *Odin* is also interesting for its structural analysis.

Elopak primarily supplies cartons for milk and other liquids. Metal Box makes a variety of packaging, including tins and other metal packaging for semi-solid foods. They established a joint venture, Odin, to research, develop and exploit a new type of container for UHT processed foods. The two parties agreed:

- (1) to create a 50/50 jointly owned company, called Odin;
- (2) to grant exclusive licenses of their intellectual property rights to Odin in the field of the agreement; however, for uses outside the field of the agreement or if Odin decided not to exploit a technology, the parents could obtain non-exclusive licenses from Odin;
- (3) that in other areas of packaging the parents were free to carry out R & D independently or with third parties, and
- (4) in case of a breakup, one of the parents would buy all of Odin's shares. The purchaser would have to grant the other party a non-exclusive, royalty-free license. The parties could not use the technology for any cooperation with a competitor.⁸⁵

The Commission applied the *Mitchell Cotts* rule that Article 85(1) does not apply to the formation of a joint venture where the parents are not actual or potential competitors.⁸⁶ The Commission reasoned that the parents were not potential com-

83. O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832.

84. See *infra* notes 110-16 and accompanying text.

85. *Odin*, O.J. L 209/15, at 16-17 (1990), [1991] 4 C.M.L.R. 832, 836-38. The Commission decided first that the agreement could not benefit from the R & D block exemption since Odin would not only produce but also distribute the goods. *Id.*

86. *Id.* at 19, ¶ 28, [1991] 4 C.M.L.R. at 841. The Commission further found no foreclosure of third parties who could still start their own R & D in this area.

petitors in the market for the new container that Odin was to develop. Neither party could enter this market alone in the short term, because entry would require the know-how of the other party. The technical and financial risk involved in carrying out research would have precluded each party from carrying out research on its own.⁸⁷

The Commission addressed the question of potential restrictions on future competition between Metal Box and Odin's new container product. The Commission found no reason to suppose that Metal Box would use its influence in a manner incompatible with Article 85(1) and concluded that the entire agreement did not appreciably restrict competition. The Commission accepted that if the joint venture were successful, the new product might compete with one of the parents' products. The Commission relied on the fact that the agreement (notably the break up provisions) was sufficient to avoid anticompetitive problems.⁸⁸

Several decisions since *GEC-Siemens/Plessey* and *Odin* tem-

87. *Id.* at 19, ¶ 25, [1991] 4 C.M.L.R. at 840-41. Outside the joint venture's market, the parents were neither actual nor potential competitors.

88. See *Konsortium ECR 900*, O.J. L 228/31 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2082. AEG Aktiengesellschaft, Alcatel NV, and Oy Nokia AB entered into a cooperation agreement for the joint development, manufacture and distribution of a pan-European digital cellular mobile telephone system, "GSM." The agreement contained the following clauses: (1) a non-compete clause under which the parties were prohibited from submitting other tenders for the GSM system in a country that was part of the Conférence Européenne des Administrations des Postes et des Télécommunications (CEPT); (2) a clause stating that if several parties were involved in new developments, the resulting technical documentation should be exchanged permanently and cost-free; (3) post-expiry, all parties would have a non-exclusive right to the technical documentation, but sublicenses to third parties would require the prior agreement of the other two parties, and royalties from these licenses would be shared among all three; (4) a party excluded from the agreement because of breach of contract would lose the right to the technical documentation; (5) the agreement could be terminated by the end of 1993 on request by any party, and (6) establishment of a joint distribution for the system. *Id.* at 32-33, Common Mkt. Rep. (CCH) [1990] 2 CEC at 2083-84.

The Commission decided that the agreement did not fall within Article 85(1), mostly on the rationale that neither of the parents could have developed the joint venture's product independently and the joint venture was the only way to carry out the expensive research. *Id.* at 33, ¶ 2, Common Mkt. Rep. (CCH) [1990] 2 CEC at 2085-86. The development of a GSM system involved high costs and the tender offers laid down tight deadlines. For these reasons, no single member of the joint venture was able to develop the system independently and there was no potential restriction of competition. In addition, on the demand side the only customers were the fifteen national CEPT network operators.

per optimism that the Commission is firmly committed to a more rigorous structural analysis under Article 85(1).

In *Alcatel Espace/ANT Nachrichtentechnik*,⁸⁹ a subsidiary of Alcatel France⁹⁰ and a subsidiary of Bosch⁹¹ notified an agreement for joint research, development, exploitation and marketing of certain space electronic equipment for communications (civil radio communications, broadcasting satellites, and data transmission to, from and between satellites). The Commission, after finding that the parties were actual competitors, placed the joint venture within Article 85(1) on two bases. First, competition between the parties was restricted because (1) as a result of their cooperation, only one of the parties would have undertaken R & D on specific projects whereas previously both might have done so; (2) the choice of one of the parties to market the products eliminated one supplier from the market, and (3) parties were exchanging competitively sensitive information.⁹² Second, the joint venture restricted competition *vis-à-vis* third party suppliers.⁹³

The Commission applied Article 85(1) even though it had earlier noted the following market characteristics:

(1) the unique character of each project, which required highly adapted research and development and a very high degree of cooperation between all the parties involved, made R & D very expensive;

(2) the large number of competitors in the EEC and worldwide,⁹⁴ and certain non-European manufacturers who, benefitting from their strong worldwide positions, had R & D budgets far superior to those of their European competitors so that non-European competitors had won contracts for a number of recent EEC projects;

(3) the main customers for the products (national tele-

89. O.J. L 32/19 (1990), [1991] 4 C.M.L.R. 208.

90. Alcatel France is the world's second largest manufacturer of communication equipment and systems. In the Alcatel Group, ATEs is the largest manufacturer of space electronic equipment carried on board satellites or space vehicles.

91. The subsidiary ANT is a leading firm in Germany in the field of telecommunications technology.

92. *Alcatel Espace/ANT Nachrichtentechnik*, O.J. L 32/19, at 23, ¶ 14 (1990), [1991] 4 C.M.L.R. 208, 216-17.

93. *Id.*

94. Even in narrowly defined product and geographical markets, the parties' combined market share was below 20 percent.

communications administrations, space agencies and organizations or direct broadcast satellite consortia) were not numerous and as a result had considerable buying power; and

(4) certain regulatory barriers prevented the provisions of services on an international basis.⁹⁵

The Commission's apparent failure to accord these factors significant weight under Article 85(1) is consistent with its traditional reluctance to engage in full structural analysis. *Alcatel* is an evolutionary throwback to the days when the Article 85(1) analysis ended with the bare finding that the parents were actual or potential competitors.⁹⁶

A second Commission decision in 1990, *Cekacan*,⁹⁷ also reflects the earlier less rigorous approach. A Swedish group, A&R, whose activities include packaging (essentially for foodstuffs), and ECA, a German manufacturer of paperboard and paperboard packaging, formed Ceka Europe to develop and market a new packaging technology (the "Cekacan" technology) only during its initial phase. The parents agreed not to compete against Ceka Europe in its territory by manufacturing or selling the products under contract and Cekacan machines; following amendment of the original agreement, the parents were permitted to manufacture and sell similar technologies. Supply agreements with the parents were included.⁹⁸ The agreement had an initial three-year term, with indefinite extensions unless terminated by one of the parties subject to ten months notice.⁹⁹

The Commission applied Article 85(1) and granted an exemption under Article 85(3).¹⁰⁰ The Commission first found

95. *Alcatel Espace/ANT Nachrichtentechnik*, O.J. L 32/19, at 22-23, ¶¶ 7-11 (1990), [1991] 4 C.M.L.R. 208, 212-15.

96. An individual exemption was granted essentially on the basis of the first condition of Article 85(3), i.e., contribution to improvement of technical and economic progress. *Id.* at 24, ¶ 18, [1991] 4 C.M.L.R. at 217-18.

97. O.J. L 299/64 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2099.

98. A&R has the right to supply Ceka with its total requirements of final products and machines. After 1995, Ceka will be allowed to purchase its machines from another source. Raw materials are in principle supplied in Germany by ECA.

99. In case of termination, A&R has the right to purchase ECA's shares in Ceka Europe. Following termination, the parties may decide to reinforce their old 1982 licensing agreement for the exploitation of the Cekacan technology.

100. *Cekacan*, O.J. L 299/64, at 70 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2099, 2107.

that the parents were not actual competitors with respect to Cekacan technology but were potential competitors in light of their overall industrial activities.¹⁰¹ The parents also directly competed with respect to certain basic materials used in the production of Cekacan packages. The Commission did not base the application of Article 85(1) on the mere competitive relationship of the parents. Specific restrictions were also cited, notably the parents' agreements not to compete against the joint venture¹⁰² and the purchase and supply agreements.¹⁰³

The reference to the non-compete provisions is troublesome because it rests on the false notion that competition between parents and a joint venture can be expected and thus can be "restricted" by the joint venture. The reference is also not entirely consistent with either the Court of Justice judgments on non-competes (reasonable covenants not to compete escape Article 85(1) entirely)¹⁰⁴ or with the Merger Regulation's treatment of non-competes ancillary to a merger or concentrative joint venture.¹⁰⁵

In sum, *Cekacan* provides ambiguous signals as to whether 1990 ushered in a new era of flexibility under Article 85(1), as

101. *Id.* at 68, ¶ 30, Common Mkt. Rep. (CCH) [1990] 2 CEC at 2103.

102. The Commission reasoned that A&R and ECA would abstain from competing against Ceka Europe because they agreed to supply their customers only through the firm; this prevented ECA from freely developing its own commercial policy within its assigned territory (Germany) and therefore removed an independent operator from the market. *Id.* at 68, ¶¶ 34-35, Common Mkt. Rep. (CCH) [1990] 2 CEC at 2104.

103. The Commission reasoned that the clauses requiring ECA to purchase exclusively from Ceka Europe the materials and services required for the production of Cekacan packaging remove incentives from ECA to engage in the manufacture of these materials (because it would not be able in any case to sell them for Cekacan applications); this also put ECA at a disadvantage *vis-à-vis* third party competitors that are free to market their products for Cekacan applications. *Id.* ¶ 37. Clauses requiring purchase of certain minimum quantities were aimed at maintaining ECA's volumes of sales in Germany constant and restricted its volume of sales outside Germany. *Id.* ¶ 38. The termination clauses were also cited as organizing the sharing of customers because they have the effect of preventing A&R from independently selling the Cekacan machines in Germany and preventing ECA from leasing the machines outside Germany. *Id.* at 69, ¶ 41, Common Mkt. Rep. (CCH) [1991] 2 CEC at 2105.

104. *Remia BV and Verenigde Bedrijven Nutricia v. Commission*, Case 42/84, [1985] E.C.R. 2566, [1987] 1 C.M.L.R. 1.

105. Merger Regulation, *supra* note 2, O.J. L 257/13 (1990).

suggested by *Odin* and *GEC-Siemens/Plessey*.¹⁰⁶

Another decision issued after *Odin* casts further doubt that a new era under Article 85(1) has dawned. In *KSB/Goulds/Lowara/ITT*¹⁰⁷ pump manufacturers formed a ten-year joint venture for research, development and production of components for pumps.¹⁰⁸

The Commission applied Article 85(1) on the following reasoning:

(1) the parties were competing pump manufacturers and were potential competitors in the market for components because they were all in the financial situation to develop the products alone;

(2) the agreements restricted competition between the parties because cooperation replaced independent actions and competition;

(3) third parties were denied access to the technology because of various secrecy provisions, the ban on sublicensing and appointment of one party as sole and exclusive manufacturer for the parties, and

(4) some of the parties in some countries had very high market shares.¹⁰⁹

106. See also *Bayer/Hoechst*, "Europe" No. 5359, at 13 (Oct. 27, 1990), where the Commission issued an Article 85(3) comfort letter exempting an agreement concluded between Bayer and Hoechst for joint research, development and marketing of a new drug for the treatment of AIDS. The exemption was justified on the basis of the special circumstances of AIDS research requiring a long term overlapping of research and marketing and resulting advantages for medical progress.

107. O.J. L 19/25 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC 2009.

108. One party is the leading European company and the largest worldwide; a second party is the world's third largest manufacturer.

109. *KSB/Goulds/Lowara/ITT*, O.J. L 19/25, at 30-31, ¶¶ 16-17 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC 2009, 2016-17. The Commission granted an exemption, finding that:

(1) the introduction of the new pumps was a significant contribution to the development of technical progress given the advantages of the new products;

(2) customers would benefit from the new more efficient products, which are energy saving and environment friendly;

(3) after analysis of the R & D costs and the financial risks implied in the development of the products, the reality of which was established by the fact that the new products were not as successful on the market as expected, the indispensability of the cooperation was recognized, and

(4) no substantial elimination of competition could be detected yet because the products were not yet marketed, and in any case, they would have had to compete with traditional pumps.

C. *Application of Article 85(1) to Particular Provisions*

The most important ruling in the *Odin* decision is the rule that where the formation of a joint venture itself falls outside Article 85(1), provisions that are no more than is necessary for its efficient operation also fall outside Article 85(1).¹¹⁰ For example, the grant of an exclusive license by parents to a joint venture does not fall within Article 85(1) if the parents are neither actual nor potential competitors.¹¹¹ One important exception to the *Odin* rule concerns territorial restrictions that the Commission is reluctant to clear under Article 85(1).

In *Odin* the following provisions fell outside Article 85(1) as ancillary to the joint venture:

(1) the parents' granting Odin an exclusive, worldwide license of relevant patent and know-how rights;

(2) for five years after the break-up of Odin, each parent was obliged not to allow a competitor of the other to use that other parent's know-how or improvements made by Odin;

(3) Odin was under an obligation to keep the parents' know-how secret, and

(4) no party could sell its share in Odin to a third party without the consent of the other party. The seller of Odin had a right of first refusal in the event of a further sale.¹¹²

The grant of exclusive intellectual property rights was seen as a guarantee that both parties would invest their full efforts to the joint venture. The rights were necessary to enable Odin to develop both the new product and the machinery and technology. They were also necessary to the manufacture and marketing of the product.

In *Mitchell Cotts* several know-how license provisions were found not to be appreciable restrictions within the meaning of

Id. at 33-36, Common Mkt. Rep. (CCH) [1991] 1 CEC at 2020-24; see *Screensport/EBU Members*, O.J. L 63/32 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC 2092.

110. *Odin*, O.J. L 209/15, at 21-22, ¶ 36 (1990), [1991] 4 C.M.L.R. 832, 844-45. This is also emphasized in Commission Press Release, IP (90) 582 (July 23, 1990).

111. This fact distinguishes the *Odin* decision from the *Mitchell Cotts* decision. *Mitchell Cotts/Sofitra*, O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111. In *Mitchell Cotts*, one of the parent companies was a competitor of the joint venture; the grant of an exclusive license was therefore a restriction to which Article 85(1) applied, although it was exempted under Article 85(3).

112. *Odin*, O.J. L 209/15, at 20-22 (1990), [1991] 4 C.M.L.R. 832, 843-45.

Article 85(1): the joint venture's obligation to keep the know-how confidential, its obligation not to grant sub-licenses, and a mutual obligation to disclose any improvements.¹¹³ A non-compete obligation was also found to fall outside Article 85(1).¹¹⁴ The exclusive license granted to the joint venture also included a territorial restriction: the joint venture's production right was limited to the United Kingdom. In other countries one of the parents was itself producing and selling the same products. The Commission considered this restriction to fall within Article 85(1) but exempted it under Article 85(3).¹¹⁵

In a number of earlier decisions, restrictions on know-how transfers were found to fall within Article 85(1) but were exempted under Article 85(3). Thus, *Odin* represents a significant relaxation of the Commission's position toward ancillary restraints.¹¹⁶

Ancillary restrictions are also governed by rules under the Merger Regulation. When restrictions are ancillary to mergers, simple or exclusive patent and know-how licenses are accepted as necessary for the completion of the transaction. They may contain field of use restrictions. Normally, territorial limitations are not considered necessary. The same principles apply to licenses of trademarks or business names.

In the case of concentrative joint ventures, the necessary transfer of technology may be accomplished by means of licenses. These licenses may be exclusive, without having to be

113. Mitchell Cotts/Sofiltra, O.J. 41/31, at 35, ¶ 21 (1987), [1988] 4 C.M.L.R. 111, 120.

114. *Id.* at 35-36, ¶ 22, [1988] 4 C.M.L.R. at 120.

115. *Id.* at 36, ¶ 26, [1988] 4 C.M.L.R. at 122.

116. For example, in VW-MAN, O.J. L 376/11 (1983), [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,551, the parties agreed not to license any know-how or patents to third parties for a use in the field of the joint venture. This restriction fell within Article 85(1), but was exempted as indispensable for the joint venture to be competitive with other manufacturers. *Id.* at 13-14, ¶¶ 16, 31, [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,551, at 11,281, 11,283.

In Carbon Gas Technologie, O.J. L 376/17 (1983), [1984] 2 C.M.L.R. 275, the Commission exempted a provision requiring that the parties would neither use the know-how nor transfer the know-how to a third party for a five-year period after the termination of the joint venture. The restriction reinforced a more general restriction on competition between the parents and their joint venture. Exemption was granted because the know-how provisions were necessary to achieve the objective of the specialization agreement. *Id.* at 20, [1984] 2 C.M.L.R. at 281.

limited in duration or territory. They are usually considered necessary to the implementation of the concentration.

IV. EXEMPTIONS OF COOPERATIVE JOINT VENTURES UNDER ARTICLE 85(3)

Generally speaking, the Commission has voiced support for joint ventures and encouraged them, particularly in high technology industries. In 1986 the Commission emphasized its favorable position toward joint ventures that contribute to market integration, risk sharing, innovation, technology transfers, development of new markets, improvements in competitiveness, strengthening small and medium-sized firms, and elimination of structural overcapacity.¹¹⁷ Joint marketing arrangements, at least where part of broader joint R & D and/or production, are not as disfavored by the Commission as before.¹¹⁸ Thus joint marketing and distribution have been exempted in several recent cases. To a certain extent the Commission's favorable competition stance is influenced by broader albeit ill-defined industrial policy considerations intended to encourage growth and innovation in high technology fields.¹¹⁹

Joint ventures vary considerably in their structures, purposes and effects. The Commission's Article 85(3) analysis under the four conditions for an exemption are highly fact-specific. General rules can be derived only with caution. The present section has the modest purpose of providing examples (and hopefully an accurate flavor) of the Commission's Article 85(3) analysis of joint venture decisions.

In many earlier decisions, the Commission appeared to accept the benefits presented by the parties without considering or weighing them against the competitive harms found under Article 85(1)—a schizophrenic approach to Article 85. This

117. COMMISSION FIFTEENTH REPORT ON COMPETITION POLICY 41-42 (1986) [hereinafter COMMISSION FIFTEENTH REPORT]. The Commission compiles and summarizes data on joint ventures in the EEC in the annual reports on competition policy.

118. See Bayer/Hoechst, Commission Press Release, IP (90) 857 (Oct. 26, 1990).

119. See Manfred Caspari, *Joint Ventures—The Intersection of Antitrust and Industrial Policy in the EEC*, in 1985 FORDHAM CORP. L. INST. 449, 451 (Barry Hawk ed., 1986). The priority sectors are information technology and telecommunications, factory automation and biotechnology. See Programme of the Commission for 1985, E.C. BULL. 36-37 (Supp. Apr. 1985).

was partly explained by the fact that the Commission failed to engage in an in-depth Article 85(1) analysis of the anticompetitive effects of the joint venture, being satisfied with "inherent" restrictions. A number of decisions in the last decade evidence a Commission attempt to bridge the gap between Articles 85(1) and 85(3), to weigh the competitive benefits and harms, and to moderate the schizophrenia, particularly through the indispensability exemption condition.¹²⁰

Under the *first condition*—improvement in production or distribution or promotion of technical or economic progress—the Commission has accepted the following benefits, among others:

(1) facilitating entry by one or both parents into a new geographic or product market;¹²¹

(2) sharing financial and other risks in connection with the development of advanced-technology products;¹²²

(3) placing the manufacture of intermediate products used by the parents on a profitable footing;¹²³

(4) simplification and acceleration of the transition of technology from the planning and research stage to that of large scale industrial application;¹²⁴

(5) reduction of overcapacity;¹²⁵

(6) utilization of a greater amount of existing capacity through the emergence of a new and efficient competitor;¹²⁶

(7) production of a wider range of sophisticated equipment at competitive prices;¹²⁷

(8) regaining competitiveness and progressively reducing losses through closure of plants, reduction in sur-

120. The decision in *Rockwell/Iveco*, O.J. L 224/19 (1983), [1983] 3 C.M.L.R. 709, provides one of the best examples of the Commission explicitly weighing competitive harms and benefits.

121. See, e.g., *De Laval-Stork*, O.J. L 215/11 (1977), [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9972.

122. See, e.g., *Vacuum Interrupters Ltd.*, O.J. L 383/1 (1980), [1981] 2 C.M.L.R. 217.

123. See COMMISSION SEVENTH REPORT ON COMPETITION POLICY 117-19 (1978).

124. See *Carbon Gas Technologie*, O.J. L 376/17 (1983), [1984] 2 C.M.L.R. 275.

125. See *Bayer/BP Chemicals*, O.J. L 150/35 (1988), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,995.

126. See *Rockwell/Iveco*, O.J. L 224/19 (1983), [1983] 3 C.M.L.R. 709.

127. See *Alcatel Espace/ANT Nachrichtentechnik*, O.J. L 32/19 (1990), [1991] 4 C.M.L.R. 208.

plus capacity and optimization of transportation costs;¹²⁸

(9) ensuring a more constant and rapid transfer of technology than would otherwise be possible, enabling introduction into the Community of high technology products that will promote competition with non-Community producers;¹²⁹

(10) allowing major progress in rationalizing production activities, improving technical efficiency and product quality in an industrial sector which is particularly threatened by imports from outside the Community;¹³⁰

(11) sharing of know-how and costs in relation to development of improved products where such development had been relatively unsuccessful when done separately by the parties,¹³¹ and

(12) energy saving.¹³²

In its *Fifteenth Report on Competition Policy*, the Commission listed the following contributions to a number of general economic objectives:

(i) integration of the internal market, especially by means of cross-border cooperation;

(ii) facilitation of risky investments;

(iii) promotion of innovation and transfer of technology;

(iv) development of new markets;

(v) improvement of the competitiveness of the Community industry;

(vi) strengthening of the competitive position of small and medium sized firms, and

(vii) elimination of structural overcapacity.¹³³

The *second condition* for exemption, that consumers receive a fair share of the benefit, has not been subject to extensive

128. See *Enichem/ICI*, O.J. L 50/18 (1988), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,962.

129. See *Optical Fibres*, O.J. L 236/30 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,813.

130. See *Bayer/BP Chemicals*, O.J. L 150/35 (1988), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,995.

131. See, e.g., COMMISSION EIGHTH REPORT ON COMPETITION POLICY 77-78 (1979) (discussing *Henkel/Colgate*, J.O. L 14/14 (1972), [1970-1972 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9491); see also *Vacuum Interrupters Ltd.*, O.J. L 383/1 (1980), [1981] 2 C.M.L.R. 217.

132. See *BP/Kellogg*, O.J. L 369/6 (1985), [1986] 2 C.M.L.R. 619.

133. COMMISSION FIFTEENTH REPORT, *supra* note 117, at 42.

analysis by the Commission. Consumer benefits are usually found in increases in sources of supply, reduction in costs,¹³⁴ better service,¹³⁵ or faster development and availability of new products.¹³⁶ In general, when the other three conditions for exemption under Article 85(3) are met, the Commission frequently considers that consumers will automatically share in the joint venture's benefits, provided that the market is sufficiently competitive.

The *third condition*, the indispensability of the restrictions imposed on the parties, has been analyzed from two angles, the Commission distinguishing (1) whether the formation of the joint venture is indispensable to achieve the asserted benefits, and (2) whether particular contractual restrictions are indispensable.

As to formation of the joint venture, the Commission has on some occasions considered less restrictive alternatives such as cross-licensing of technology or specialization agreements.¹³⁷ It has also considered whether less restrictive joint ventures could have been formed by each parent with smaller competitors.¹³⁸ However, the indispensability of the joint venture itself has rarely been challenged in decisions.¹³⁹ Joint ventures have been found indispensable on the grounds that:

(1) coordination of investment was necessary in order to prevent costly and inefficient overcapacity in Member States based on national rather than EEC requirements;

(2) the joint venture afforded the parties a better opportunity for achieving more "acceptable, timely and technical solutions than the free play of competition" between them, and

(3) the joint venture was indispensable to the agree-

134. See *Optical Fibres*, O.J. L 236/30 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,813; see also *ENI/Montedison*, O.J. L 5/13 (1987), [1988] 4 C.M.L.R. 444.

135. See *Rockwell/Iveco*, O.J. L 224/19 (1983), [1983] 3 C.M.L.R. 709.

136. See *Vacuum Interrupters Ltd.*, O.J. L 383/1 (1980), [1981] 2 C.M.L.R. 217.

137. See *ENI/Montedison*, O.J. L 5/13 (1987), [1988] 4 C.M.L.R. 444; *GEC-Weir Sodium Circulators*, O.J. L 327/26 (1977), [1976-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,000.

138. See *Optical Fibres*, O.J. L 236/30 (1986), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,813.

139. In *Enichem/ICI*, the Commission engaged in detailed analysis of the necessity for the joint venture. See *Enichem/ICI*, O.J. L 50/18 (1988), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,962.

ment of U.S. partners to transfer advanced technology, when simple licensing would not have provided for the necessary continual updating of technology.¹⁴⁰

Specific restrictive provisions of the joint venture agreement are accepted as indispensable where they are reasonably related or ancillary to the joint venture, as where they are necessary to promote the legitimate objectives or achieve the asserted benefits of the joint venture. This analysis is akin to the ancillary restraints doctrine which is used both under the Merger Regulation and under the *Odin* rule with respect to joint ventures falling outside Article 85(1).

Ancillary provisions have included non-compete clauses, which have generally been found indispensable,¹⁴¹ exclusive purchase and supply arrangements, which may be regarded as indispensable depending upon the facts,¹⁴² and licensing agreements.

The *fourth condition* for exemption, when there is no possibility of elimination of substantial competition, has received less attention in the Commission's decisions and is not further examined here.

V. CONCLUSION

Joint ventures require a unified analysis in which both behavioral and structural elements are examined. This remains true whether a "structural" merger statute or a "behavioral" restrictive agreement/cartel statute is applied. The analysis must focus on the three competitive risks:

- (1) the loss of actual or potential competition between the parents in the market in which the joint venture operates;
- (2) cartel or anticompetitive conduct between the parents in non-joint venture markets in which the parents compete (the spillover effect), and
- (3) foreclosure of third parties.

140. See John H. Riggs, Jr. & Anthony Giustini, *Joint Ventures Under EEC Competition Law*, 46 BUS. LAW. 849, 900-01 (1990).

141. See, e.g., Carbon Gas Technologie, O.J. L 376/17 (1983), [1984] 2 C.M.L.R. 275; Vacuum Interrupters Ltd., O.J. L 383/1 (1980), [1981] 2 C.M.L.R. 217.

142. The Commission approved of these restrictions in Rockwell/Iveco, O.J. L 224/19 (1983), [1983] 3 C.M.L.R. 709, and Vacuum Interrupters Ltd., O.J. L 383/1 (1980), [1981] 2 C.M.L.R. 217.

Excluded are asserted anticompetitive effects or restrictions on competition between the parents on the one hand and the joint venture on the other, at least with respect to competition in the joint venture's market. Competition between the parents and the joint venture should not be expected or postulated.

The unfortunate division of the antitrust analysis in Article 85 is peculiarly damaging to an intellectually coherent and predictable treatment of joint ventures. This is so because the structural context (e.g., actual or potential competitive overlap of the parents, market shares, and entry conditions) is even more important in assessing the competitive harms and benefits of a joint venture than is the case with most other horizontal and vertical agreements. It is these structural factors that are most logically included under Article 85(1).

The only textual obstacle to a more rigorous and complete structural analysis under Article 85(1) is Article 85(3)'s reference to a not insubstantial elimination of competition. The solution which best preserves the textual integrity of the statute, and one which promotes better legal certainty and administration, is the following:

(1) Place the entire structural analysis under Article 85(1) with respect to formation of the joint venture. Thus, market shares, concentration data, and entry conditions would be used to determine whether "appreciable" harmful effects could be expected. Structural factors might also be used as filters or screens; market power thresholds, for example, might be established.

(2) The mere finding that the joint venture parents are actual or potential competitors should not trigger Article 85(1). More questions must be answered (e.g., relative market shares and entry conditions).

(3) Structural analysis is essential with respect to the three competitive risks: (a) loss of actual or potential competition in the joint venture's market; (b) spillover (the collusive behavior between the parents in markets outside those of the joint venture), and (c) foreclosure or exclusion of competitors and third parties. With respect to the spillover risk, the structural factors must be supplemented with other factors pertinent to the risk of the parents' colluding in markets outside the joint venture's

market (e.g., their prior history, or factors showing a collusion-prone industry or market).¹⁴³

(4) If formation of the joint venture falls outside Article 85(1), then the ancillary restraints analysis should apply to individual obligations and restrictions.

(5) If formation of the joint venture falls within Article 85(1), then individual provisions must be reviewed under both Articles 85(1) and 85(3).

(6) The Article 85(3) analysis should not include structural factors, except that the last exemption condition could be used as a dominant position filter to deny an exemption. Article 85(3) would continue to require proof of economic and technical benefits and proof that formation of the joint venture was necessary to obtain those benefits (with a corollary analysis of any specific provisions).

A broadening of the inquiry under Article 85(1) has the considerable if not decisive advantage of decentralization through the expansion of national courts' power to examine the antitrust validity of joint ventures. A block exemption covering all joint ventures would probably not provide a good deal of legal certainty given the variety of ventures and the fact-specificity of the analysis.

The Commission is preparing guidelines on joint ventures.¹⁴⁴ Guidelines are useful and will be welcomed by business and the bar. They cannot substitute, however, for a rigorous and complete structural analysis of each fact-specific joint venture.

143. Query whether additional non-structural factors are needed to assess the foreclosure risks. This would not appear to be the case under U.S. antitrust law. *Cf.* *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Department of Justice Guidelines*, *supra* note 13, § 3.5, at 53.

144. In January 1992 the Commission circulated for comment draft guidelines on cooperative joint ventures. The draft guidelines are reproduced in the Appendix to this Article.

APPENDIX

DRAFT COMMISSION NOTICE

GUIDELINES FOR THE APPRAISAL OF COOPERATIVE
JOINT VENTURES IN THE LIGHT OF ARTICLE
85 OF THE EEC TREATY

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I. *PURPOSE*

This Notice deals with the appraisal of cooperative JVs (joint ventures) in the light of Article 85 of the EEC Treaty. JVs, as defined in the Commission Notice regarding the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89,¹ are undertakings that are jointly controlled by other undertakings. "Control" is taken to mean the possibility of exercising, directly or indirectly, a decisive influence on the activities of the JV. The effects on competition of

1. OJ No L 257, 21.9.1990, p. 14.

other forms of association which do not involve joint control but which enable one or more firms to influence appreciably the activities of one or more other firms may, however, be similar to those of JVs. Examples include the acquisition of a minority holding, unilateral, multilateral or reciprocal, whether or not it entails representation on the various bodies of the firms concerned. Such holdings must therefore also be dealt with in this Notice.

Whether a JV or other form of association between firms can be classed as cooperative depends on whether or not it involves concentration as defined by Article 3(2) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. Those operations should therefore be regarded as cooperative which have as their object or effect the coordination of the competitive behaviour of firms which remain independent. This category includes the establishment of a JV where it entails a risk of coordination of the competitive behaviour between the parents themselves or between the parents and the JV. This is even true where, by virtue of the agreement to establish the JV, or its existence or operation, either party, without necessarily communicating its intentions to the other, can reasonably be expected to adapt its behaviour to that of the JV in order to protect, and obtain a return on, its investment. Cooperative operations continue to fall within the scope of Articles 85 and 86 of the EEC Treaty and must be considered in the light of those provisions when proceedings are conducted under Regulation No 17,² and Regulations (EEC) No. 1017/68,³ No. 4056/86⁴ and No 3975/87.⁵ Concurrently with the introduction of the new legal regime arising from the Regulation on the control of concentrations between undertakings the Commission intends to spell out as clearly as possible, in the interests of the legal certainty of firms, the legal and economic considerations which inform its competition policy as applied to cooperative operations under Article 85 of the Treaty.

2. OJ No 13, 21.2.1962, p. 204/62.

3. OJ No 175, 23.7.1968, p. 10.

4. OJ No L 378, 31.12.1986, p. 4.

5. OJ No L 374, 31.12.1987, p. 1.

This Notice is without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

II. *JOINT VENTURES*

A. *Economic Context*

JVs may cover various fields of cooperation between firms: their purpose may be R&D, the purchase of basic or intermediate products, investment, production or sales planning, the fixing of prices, the sharing of markets, or joint selling.

The number of new JVs in the Community is growing steadily, mainly because enterprises:

- increasingly want to spread the risk of costly technological development;

- are tending to concentrate more on the fields of activity in which they have a great deal of experience, while seeking, via JVs, to remain abreast of new and promising developments in other fields;

- want to step outside what are often still the national confines of their markets and gain a foothold in other regions of the Community.

JVs can give a spur to competition by promoting new technological developments, the creation of new products and the penetration of new markets, thus speeding up economic integration. Yet they can also act as a barrier to competition, in particular when they lead to market sharing or when they raise the barriers to entry.

In terms of its purpose, a JV may be intended by its parents as a partial and temporary instrument of cooperation, in which case it is often limited to an ancillary role such as: purchasing raw materials; acquiring know-how; carrying out certain types of research and development work and exploiting the results; financing investment; manufacturing certain products or taking over certain work or internal-management tasks such as accountancy, collection, tax or management consultancy, market research, advertising, the coordination of sales or the provision of certain services.

In other situations the JV performs on a lasting basis all the functions of an enterprise and in that capacity operates on the market as an independent supplier or purchaser.

B. *The JV's Effect on Competition*

The appraisal of a JV in the light of the rules on competition will focus on the relationship between the enterprises concerned and on the effects of their cooperation on third parties. In this respect the first task is to check whether the establishment or operation of the JV is likely to restrict competition between the parents or between one or more parents and the JV. This must be followed by an examination of whether the operation in question is likely to affect the competitive position of third parties. Depending on the circumstances there may be no restrictive effects at all on competition or such effects may be evident in one or more of the relationships referred to above.

1. Competition Between Parent Companies

Competition between parent companies can be restricted only if those companies are already actual or potential competitors.

There is no restriction of competition if the JV operates outside the actual or potential fields of activity of the parent companies; its establishment therefore has only a positive effect, since it creates a new competitor. The same is true when the JV brings together activities of the parent companies in a field in which they cannot hold their own; this will make the JV a permanent player on the market.

If there is genuine and open competition between the parent companies and if it is intended that the JV should operate in markets identical, adjacent or related to those of its parents it is very likely that cooperation between them will entail some restriction of competition.

In order to assess in an individual case whether there is a potential-competition relationship between the parent companies,^{5a} the approach followed must be as realistic as possible, and provide answers to the following main questions (which, while focused specifically on the production of goods, are also applicable to the provision of services):

—Contribution to the JV

Does each parent company have sufficient financial re-

5a. See Thirteenth Report on Competition Policy (1983), point 55.

sources to carry out the planned investment? Does each parent company have sufficiently qualified managerial capacity and the necessary knowledge to run the JV? Does each parent company have access to the necessary sources of input products?

—Production of the JV

Is each parent company familiar with the technology being applied? Does each parent company manufacture the products upstream or downstream and have access to the necessary production facilities?

—Sales by the JV

Is actual or potential demand such as to enable each parent company to manufacture the product on its own? Does each parent company have access to the distribution channels needed to sell the product manufactured by the JV?

—Risk Factor

Can each parent company on its own bear the technical and financial risks associated with the production operations of the JV?

—Barriers to Market Access

Is each parent company on its own capable of entering the geographical market concerned? Is access to that market impeded by artificial tariff or non-tariff barriers? Can each parent company overcome those barriers without undue effort or cost?

The parents of a JV should not be regarded as potential competitors unless, in the light of all relevant economic factors, they can reasonably be expected to enter the market individually. The relative weight given to each criterion when assessing potential competition may well vary from case to case.

2. Competition Between the Parent Companies and the JV

Competition between the parent companies and the JV can be restricted only if the JV operates on the same markets as its parents, on markets upstream or downstream or on neighbouring markets. In such cases the firms concerned often divide up the geographical or product market, in particular by specializing their production, or by sharing out the customers. If, however, the parent companies and the JV remain

active competitors they may well be tempted to soften competition by coordinating or aligning their behaviour as regards pricing or the volume of production or sales.

3. Effects on the Position of Third Parties

The restrictive effect on third parties depends on the JV's activities in relation to those of its parents and on the combined economic strength of the firms concerned.

Where the parent companies leave it to the JV to handle their purchases or sales, the choice available to suppliers or customers is restricted. The same is true when the parent companies arrange for the JV to manufacture primary or intermediate products or to process products which they themselves have produced. The setting-up of a JV may even exclude from the market the parents' traditional suppliers and customers; that risk increases in step with the degree of oligopolization of the market and the existence of exclusive or preferential agreements between the JV and its parents.

The existence of a JV may even be a barrier to market entry by potential competitors or impede the growth of the parents' competitors.

4. Factors in the Appraisal

The scale of a JV's effects on competition depends on a number of factors, the most important of which are:

- the market shares of the parent companies and the JV, the structure of the relevant market and the degree of concentration in the sector concerned;

- the economic and financial strength of the parent companies, and any technical or commercial edge which they may have;

- the market proximity of the activities carried out by the JV;

- whether the fields of activity of the parent companies and the JV are identical or independent;

- the scale of the JV's activities in relation to those of its parents;

- the extent to which the arrangements between the firms concerned are restrictive;

- the extent to which the operation keeps out third parties.

C. Appraising JVs in the Light of Article 85(1)

The appraisal of a JV under the rules of competition does not depend on its legal structure. What matters is the restrictive nature of the clauses agreed upon by the parties, and the impact of the creation and operation of the JV on market conditions.

1. JVs Which Are Not Caught by the Ban on Restrictive Agreements

Article 85(1) does not apply to the following categories of JV, since they do not have as their object or effect the prevention, restriction or distortion of competition within the common market and are not likely to have an appreciable effect on trade between Member States.

a. JVs Formed Within a Single Group of Firms

Where a JV is formed by firms which all belong to the same group and which are not in a position freely to decide their market behaviour, the creation of that JV is merely a matter of internal organization and allocation of tasks within the group and is accordingly neutral in its impact on competition.

b. JVs Whose Activities Are Neutral in Their Impact on Competition

The Commission Notice of 1968⁶ lists forms of cooperation between firms which, by their nature, do not restrict competition. It also deals with cases in which cooperation takes place via a JV. The definitions and delimitation criteria set out in that Notice—and apparent from the case-law of the Court of Justice and the administrative practice of the Commission—are applicable to such JVs.

There are four types of JV [sic] in that category:

aa. JVs Which Perform Certain Internal Organizational Tasks on Behalf of Their Parent Companies

This includes JVs which collect, analyse and process data

6. Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises (OJ No C 75 of 29 July 1968, p. 3; Corrigendum, OJ No C 93, 15.3.68 [sic], p. 14).

on behalf of their parent companies, provide them with a tax or business consultancy service or perform certain internal functions on their behalf in the area of information gathering, credit guarantees or debt collection. It also includes JVs looking after the technical or organizational aspects of the joint use of existing production facilities and storage or transport equipment. In all such cases the effect on the business decisions of the parent companies and, hence, on competition, is nil.

bb. JVs Which Organize Cooperation Between Their Parent Companies in Fields Removed from the Markets

JVs which deal solely with research and development do not, generally speaking, restrict competition, even where their parents compete with each other.

cc. JVs Which, in Fields Which Are Close to the Market, Organize Cooperation Between Firms Which Do Not Compete with Each Other

JVs which are formed by non-competing firms and which are designed to provide a joint selling after-sales or repair service are not caught by the ban on restrictive practices since they do not restrict competition between their parents and do not affect the position of third parties.

The same is true of JVs set up as consortia for the execution of orders where the parents do not compete with each other as regards the work to be done or where each of them by itself is unable to execute the orders.

dd. JVs Which Organize Cooperation Between Competitors in Fields Which Are Close to the Market

Exceptionally, the ban on restrictive practices does not cover this type of JV provided that the parents' freedom to compete with each other, and the position of third parties, are unaffected. This group includes parents which pool their advertising effort or use a common quality label.

c. JVs of Minor Economic Importance

Agreements, decisions and concerted practices which form the basis of a JV also fall outside the scope of Article 85 if they do not have as their object or effect an appreciable restric-

tion of competition. In its Notice on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community⁷ the Commission gives concrete meaning to the concept "appreciable" by setting quantitative criteria and by explaining their application, thus enabling firms to judge for themselves whether their agreements fall under Article 85(1). The prohibition does not normally apply to such agreements if:

—the goods or services which are the subject of the agreement, together with the participating firms' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not, in the area of the common market covered by the agreement, represent more than 5% of the total market for such goods or services and

—the aggregate annual turnover of the participating firms does not exceed ECU 200 million.

d. JVs Which Do Not Affect Trade Within the Community

Article 85(1) does not apply to JVs which are not likely to affect trade between Member States, e.g. when the JV's actual or foreseeable effects on competition are strictly limited to the territory of a Member State or to the territory of non-member countries.

Nor does Article 85(1) apply in cases where the JV has only an insignificant effect on trade or the structure of competition within the common market. Trade between Member States is likely to be appreciably affected only when the thresholds referred to in the Notice on agreements of minor importance are exceeded.

2. JVs Likely to Fall Under the Ban on Restrictive Agreements

In the case of JVs which are likely to be caught by Article 85(1) a distinction should be made between those formed by competing firms and those formed by non-competing firms.

7. OJ No C 231, 12.9.1986, p. 2.

a. JVs Between Non-Competing Firms

The appraisal of JVs between firms which do not compete with each other focuses as much on the nature of the JV's operations in relation to those of its parents (see II. B. 2) as on the effects they have on the position of third parties (see II. B. 3).

Where the JV merely markets what its parents produce the ban on restrictive agreements does not normally apply (see II. C. 1(b)(cc)).

If the JV manufactures primary or intermediate products for its parents or processes the goods produced by one or more parent companies the application of Article 85(1) cannot normally be ruled out, since there may be restrictions of competition both between the JV and its parents and vis-à-vis third parties. There is even a great likelihood that, where the JV is in a strong position on the markets concerned, the buying or selling possibilities of third parties will be affected.

b. JVs Between Competing Firms

Depending on the functions performed by the JV on behalf of its parents there are two separate types of cases in which competition both between the firms concerned and vis-à-vis third parties is affected.

aa. Pooling of Certain Specific Functions

This type of case covers JVs which perform only certain functions and are not present on the market in their own right. These are JVs which are not covered by the Notice on cooperation between enterprises. Typically, they carry out certain activities on behalf of their parents in the field of research and development, purchasing, sales or production:

- research and development JVs may, in exceptional cases, restrict competition if they exclude individual research and development or if cooperation in the field of research and development has a direct impact on the conditions of competition on the market in the resulting product. Competition tends to be restricted when cooperation extends to activities involving exploitation of the results of research and development;

- sales JVs exclude competition between the parent

companies as suppliers, thereby limiting the choice offered to buyers;

—production JVs have effects on competition which differ according to whether they take over all or part of their parents' production activities.

In the first case the parents continue to compete on the marketing side only. The room for competition is appreciably reduced, however, in that their manufacturing costs are the same; this is even true where parents sell the JV's products under different brands.

In the second case there are two separate types of situation [sic]:

—If the JV is handling the final stage of production, processing what its parents produce, competition between the parents is generally severely restricted, since their cooperation is close to the market and transfer prices tend to become uniform;

—If the JV manufactures primary or intermediate products the likelihood of restraint of competition between the parents increases with the importance of the primary or intermediate product in the manufacture of the final product. The share of the primary or intermediate product in the cost of the final product is crucial: if it is more than 50% of total cost, competition between the parents will be heavily reduced.

bb. Fully-Fledged JVs

This category covers JVs which perform all the functions of a firm and are thus present on the market as suppliers or buyers. In order to determine to what extent their activities restrict competition a distinction must be made between the following subgroups:

—If the JV operates on the same market as its parents, it is very likely, not to say inevitable, that competition between the firms concerned will be restricted;

—If the JV operates on a market upstream or downstream of that of the parents with which it has supply or delivery links the effect on competition between the parents will be the same as in the case of JVs which perform only some of the functions of a firm (see (aa) above);

—If the JV operates on a market adjacent to that of its

parents, competition is restricted only if the two markets are interdependent. This is the case where a JV manufactures products which are complementary to those of its parents;

—If the JV operates on a market which is completely removed from that of its parents the JV will rarely entail any restraint of competition. Such a situation might arise where the JV's turnover becomes so important to the parent companies' profitability that their propensity to compete actively with each other is diminished.

Combinations of these types of JV are often found in everyday economic life. An overall assessment will then need to be made of the resulting restrictions of competition between the firms concerned, and of the effects which their cooperation has on third parties. Only those restrictions of competition which can be foreseen when the JV is formed and which can reasonably be expected to materialize must be taken into consideration.

c. Networks of JVs

Special attention must be paid to networks of JVs in their various shapes.

—The First is where competing parent companies establish several JVs which operate on the same product market but in separate areas. On top of the restrictions of competition which can already be attributed to each JV, there will then be those which arise in the relations between JVs. At the same time, competition will be further reduced between the parent companies.

—The restrictive effects on competition are also likely to be aggravated when competing parent companies set up several JVs in respect of complementary products which they themselves intend to process, or even in respect of different products which they themselves market.

—The most severe effect on competition occurs when partners competing in the same oligopolistic sector set up a multitude of JVs for related products or numerous intermediate products.

—Even where the JV is formed by non-competing firms and does not, on its own, entail any restraint of competition, it can fall under Article 85(1) if it belongs to a network of JVs set up, with different partners, by the same firm and

for the same product market.⁸ If the said partners compete with each other there will, additionally, be restrictive effects in the relationships between them.

D. Exempting JVs Under Article 85(3)

1. Block Exemption

JVs falling within the scope of Article 85(1) are exempted from the ban on restrictive agreements if they satisfy the tests laid down in a block exemption regulation. Cooperation via JVs is, under the terms of two Commission Regulations, allowed in the field of research and development and production, but not in that of sales. A further two Regulations authorize certain agreements that restrict competition when technology is transferred to a JV by its parents, provided that the latter are not competitors.

a. "Specialization" Regulation

Commission Regulation (EEC) No 417/85 on the application of Article 85(3) of the Treaty to categories of specialization agreements⁹ authorizes joint manufacturing, subject to a twofold condition: the aggregate market share of the participating firms must not represent more than 20% and their aggregate annual turnover must not exceed ECU 500 million.

Where the turnover exceeds the limits specified, the participating firms may make use of an accelerated procedure in order to have the exemption under the Regulation applied to them. The exemption also covers the joint manufacture of products which were not previously made by any of the participating firms. If the JV is also handling sales it can be exempted only by way of an individual decision.

The Regulation accordingly applies only to JVs which are not fully-fledged firms. It does, however, cover the entire range of JVs which perform specific manufacturing functions. This includes the joint manufacture of primary, intermediate or finished products, provided that such products are supplied exclusively to the parent companies and that those companies

8. Optical fibres.

9. OJ No L 53, 22.2.1985, p. 1.

are not themselves manufacturers in the same field of activity as the JV.

b. "Joint Research and Development" Regulation

Regulation (EEC) No 418/85 on the application of Article 85(3) of the Treaty to categories of research and development agreements¹⁰ authorizes the establishment of JVs whose activities may range from research and development to the joint exploitation of the results (production and the granting of licences). The Regulation puts a ceiling of 20% on the market share but places no limit on turnover. Joint selling via a JV can, however, be exempted only by way of an individual decision.

The research and development Regulation likewise applies only to JVs which are not fully-fledged firms. It does, however, allow all forms of cooperation in the field of production, since specialization is not made a requirement; the parent companies may therefore start or continue production in the same field as the JV. The JV's production may, however, be marketed only by its parents. On the other hand the JV may be charged with granting licences to third parties. This increased scope for cooperation is also available to large competing firms.

It is, however, limited to the exploitation of the results of joint research and development, the exemption applying on condition that such results substantially contribute to technical or economic progress and are decisive for the manufacture of new or improved products.

c. "Patent Licensing" and "Know-How Licensing"
Regulations

Regulation (EEC) No 2349/84 on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements¹¹ also covers agreements between the parent companies of a JV or between a parent company and the JV, provided that those agreements relate to the activities of the JV and that the parent companies are not competitors. The Regu-

10. OJ No L 53, 22.2.1985, p. 5.

11. OJ No L 219, 16.8.1984, p. 16.

lation applies to pure patent licensing agreements and to combined patent licensing and know-how agreements.

The Regulation authorizes the granting to a JV of exclusive territorial licenses covering manufacture and sales; protection through a ban on exports from the respective territories of the JV and the parent companies throughout the period of validity of the contract; and protection of a JV's territory against active competition (manufacturing and advertising) from other licensees throughout the period of validity of the contract and, for five years from the date on which the product is first put on the market in the Community, also against passive competition (imports) from other licensees.

Regulation (EEC) No 556/89 on the application of Article 85(3) of the Treaty to certain categories of know-how licensing agreements¹² contains similar provisions, except that the territorial protection between the JV and its parents is limited to ten years from the signature of the first licensing agreement concluded in the Community; the signature of that agreement also marks the beginning of the period in which the JV may be protected against active competition (ten years) and passive competition (five years) from other licensees.

2. Exemption by Way of an Individual Decision

An individual exemption may be granted following notification where a JV restricts competition but satisfies the four tests set out in Article 85(3).

The Commission must first check whether the JV entails objective advantages which offset the risks which its establishment and operation pose to competition.

A JV is deemed to entail objective advantages when, by improving production or distribution, in particular through the introduction of new or more advanced products and processes or through the opening-up of new markets, it helps to improve the competitiveness of the firms concerned and thus fosters dynamic competition on a market with a competitive structure. JVs which lead to major new investment usually have positive effects.

On the other hand, JVs have essentially negative effects on

12. OJ No L 61, 4.3.1989, p. 1.

competition when they provide their parents with either the means to coordinate or align their competitive behaviour, be it in the present (in particular by fixing prices, agreeing on the quantities to be produced or sold, or sharing cut markets) or in the future (in particular by joint planning of investment), or a reason for doing so.

Such JVs constitute, or operate as, a traditional cartel.

In any case the overall appraisal of the JV is bound to be negative if its establishment leads to the elimination of competition in respect of a substantial part of the products concerned. No exemption can therefore be granted in cases where, by grouping together the activities of the parent companies, the JVs serve to establish, underpin or accentuate a dominant position.

That is why major cases (in terms of the economic and financial power and market share of the firms concerned) will always require a detailed individual scrutiny which enables their objective advantages to be weighed up against the resulting adverse effects on competition.

3. Situations in Which Exemption Is Given Sympathetic Consideration

Some JVs must normally be given sympathetic consideration from the point of view of competition.

This applies to JVs which create substantial new capacity or which significantly increase their parents' existing capacity (whether this involves the extension of a product range, of production or of a market). They are normally granted exemption under Article 85(3), within specified limits for the aggregate market share of the firms concerned.

The said market share should not normally exceed 20% where cooperation between the parents does not extend beyond production, and 10% when it includes marketing. It is necessary to make such a distinction because the risk to competition increases as cooperation moves nearer the market.

Within those market-share limits it is fair to assume that the effects in terms of the exclusion of third parties, and the risks in terms of barriers to entry are kept within reasonable proportions and that the market structure will continue to ensure effective competition.

Networks of JVs cannot, however, be given sympathetic consideration as such and must accordingly be assessed on a case-by-case basis. Sympathetic consideration can under no circumstances be given to JVs which help further to tighten an already narrow oligopoly.

E. Ancillary Restrictions

1. Principles of Evaluation

A distinction must be made between restrictions of competition which are inherent in the actual creation of a JV, and additional agreements which would, on their own, constitute restrictions of competition by limiting the freedom of action in the market of the firms concerned. Those additional agreements are either directly related and necessary to the establishment and operation of the JV in so far as they cannot be dissociated from it without jeopardizing its existence, or are simply concluded at the same time without having those features.

Only additional agreements which are directly related and necessary to the JV must be assessed together with the JV itself and be treated, in the light of the rules of competition, as ancillary restrictions if they remain subordinate in importance to the main object of the JV. In particular as concerns the necessity of the restriction, it is proper not only to take account of its nature, but equally to ensure that its duration and subject-matter, and geographical field of application, do not exceed what the creation and operation of the JV reasonably requires.

If a JV does not *per se* fall within the scope of Article 85(1), then neither do any additional agreements which, while they restrict competition, are ancillary to the JV in the manner described above.

Conversely, if a JV falls within the scope of Article 85(1), then so will any ancillary restrictions. The same exemption criteria will then apply to both, and no specific justification need be given as regards the ancillary restrictions.

On the other hand, additional agreements which are not ancillary to the JV normally fall within the scope of Article 85(1), regardless of the fact that the JV itself may not. For them to be granted exemption under Article 85(3), an individual assessment must first be made on their own merits, irrespective of the merits of the JV itself.

In view of the diversity of JVs and of the restrictions that may be linked to them, only a few examples can be given of how those principles are applied, drawing on past experience.

2. Assessment of Certain Additional Restrictions

When attempting to determine whether additional restrictions are ancillary a distinction must be made between those which affect the JV and those which affect the parent companies.

a. Restrictions on the JV

Of the restrictions which affect the JV, those which give concrete expression to its object (e.g. contract clauses which specify the product range and the location of production) may be regarded as ancillary. Additional restrictions which go beyond the definition of the corporate object and which relate to quantities, prices or customers, and prohibitions of exports, may not.

Thus when a JV involves the creation of new production capacity or the transfer of technology from the parent companies, the obligation imposed on the JV not to manufacture or market products competing with the licensed products may be regarded as ancillary; the JV must seek to ensure the success of the new production unit, without depriving the parent companies of the necessary control over exploitation and dissemination of their technology.¹³

Depending on circumstances, other restrictions on the JV which should be seen as an inevitable consequence of the parents' wish to limit cooperation to a specific field of activity and avoid compromising the object and existence of the JV,¹⁴ may also be regarded as ancillary.

Where the parent companies assign to the JV certain stages of production or the manufacture of certain products, obligations on the JV to purchase from or supply its parents may also be regarded as ancillary, at least during the JV's start-up period.

13. Mitchell Cotts/Sofitra.

14. Elopak/Metal Box—Odin.

b. Restrictions on the Parent Companies

A clause which bars the parent companies from competing with the JV or from competing actively with it on its territory, at least during the starting-up period, may be regarded as ancillary. Additional restrictions relating to quantities, prices or customers, and bans on exports obviously go beyond what is required for the setting-up and proper operation of the JV.

The following in particular have been regarded as necessary during the starting-up period of a JV designed to enable a parent company to become established on a new market: territorial restrictions imposed on that parent company, through the grant to the JV of an exclusive manufacturing licence, in respect of fields of application or product markets in which both the JV and that parent company are active.¹⁵

On the other hand the grant to the JV of an exclusive exploitation license has been regarded as necessary (without any time-limit other than the duration of the JV itself) in cases where the parent company granting it was not active in the same field of application or on the same product market as that for which the license was granted.¹⁶

This will generally be the case with JVs undertaking new activities in respect of which the parent companies are neither actual nor potential competitors.

III. OTHER FORMS OF ASSOCIATION BETWEEN FIRMS

Other forms of association between firms can produce effects on competition similar to those of JVs. This is true of minority holdings, whether unilateral, multilateral or reciprocal, whether or not they involve representation on the decision-making bodies of the firms concerned.

A. *Assessment in the Light of Article 85(1)*

The acquisition by a firm of a non-controlling interest in a competitor is not *per se* caught by Article 85(1). It may nevertheless serve as a means of influencing the behaviour of the firms concerned in such a way as to restrict or distort competition on the market in which those firms operate. This is the

15. Mitchell Cotts/Sofitra.

16. Elopak/Metal Box—Odin.

case in particular where the shareholding is used to underpin cooperative links between the firms concerned or create a structure which lends itself to such cooperation.¹⁷

Similar but more substantial restrictive effects on competition occur when several firms which are already competing among themselves take out a minority shareholding in a competing third party which, while it does not give them joint control over the third party, makes it possible for them to agree jointly on or align the competitive behaviour of all the firms concerned.

Cross-shareholdings between competitors, especially when they are combined with representation on the decision-making bodies of the partners concerned, are likely to enable the firms to inform and influence each other. They accordingly constitute a prime means of coordinating their market behavior and thus of reducing if not eliminating competition between them. In such cases the applicability of Article 85(1) is not normally in doubt.

B. Assessment in the Light of Article 85(3)

The possibility of granting an exemption depends on all the circumstances surrounding the acquisition of the holdings concerned.

If it merely replaces a traditional cartel or accentuates its effects in such a way as to preserve existing market structures the conditions for granting an exemption are not deemed to be fulfilled.

If, however, the holdings are acquired as part of an effort at cooperation the positive effects of which outweigh the risks to competition, an exemption may be granted to them at the same time and on the same terms as to the cooperation itself.

17. Judgment in Joined Cases 142 and 156/84 *BAT and Reynolds v. Commission* [1987] ECR 4566 [sic].